Office Supreme Court, U. S.
FILED,
DEC 16 1907
JAMES H. McKENNEY,
CLERK.

No. 15 .... ORIGINAL.

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

UNITED STATES OF AMERICA, EX REL. STATE OF NEBRASKA,

*Petitioner,*

*v.*

WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA,

*Defendants.*

---

## MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

---

WILLIAM T. THOMPSON,
ATTORNEY GENERAL,
WILLIAM B. ROSE,
DEPUTY ATTORNEY GENERAL,
*Counsel for Petitioner.*

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

IN THE

# Supreme Court of the United States.

| | |
|---|---|
| UNITED STATES OF AMERICA, EX REL. STATE OF NEBRASKA, *Petitioner,* v. WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA, *Defendants.* | ORIGINAL. |

## MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Now comes the State of Nebraska, petitioner, by William T. Thompson, its attorney general, and moves this honorable court for leave to file in the above entitled cause its petition, praying that a writ of mandamus may issue commanding the Honorables William H. Munger and

Thomas C. Munger, United States district judges for the district of Nebraska, holding the circuit court of the United States for the Lincoln division of said district of Nebraska, to remand to the supreme court of the State of Nebraska the case wherein the State of Nebraska, William T. Thompson, attorney general, and the Nebraska State Railway Commission composed of Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., are plaintiffs and Chicago, Burlington & Quincy Railroad Company is defendant.

.....

*Counsel for Petitioner.*

FILED
DEC 24 1907
JAMES H. MCKENNEY
Clerk

No. 15 ... Original.

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

UNITED STATES OF AMERICA, EX REL. STATE OF NEBRASKA,

*Petitioner,*

*v.*

WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA,

*Defendants.*

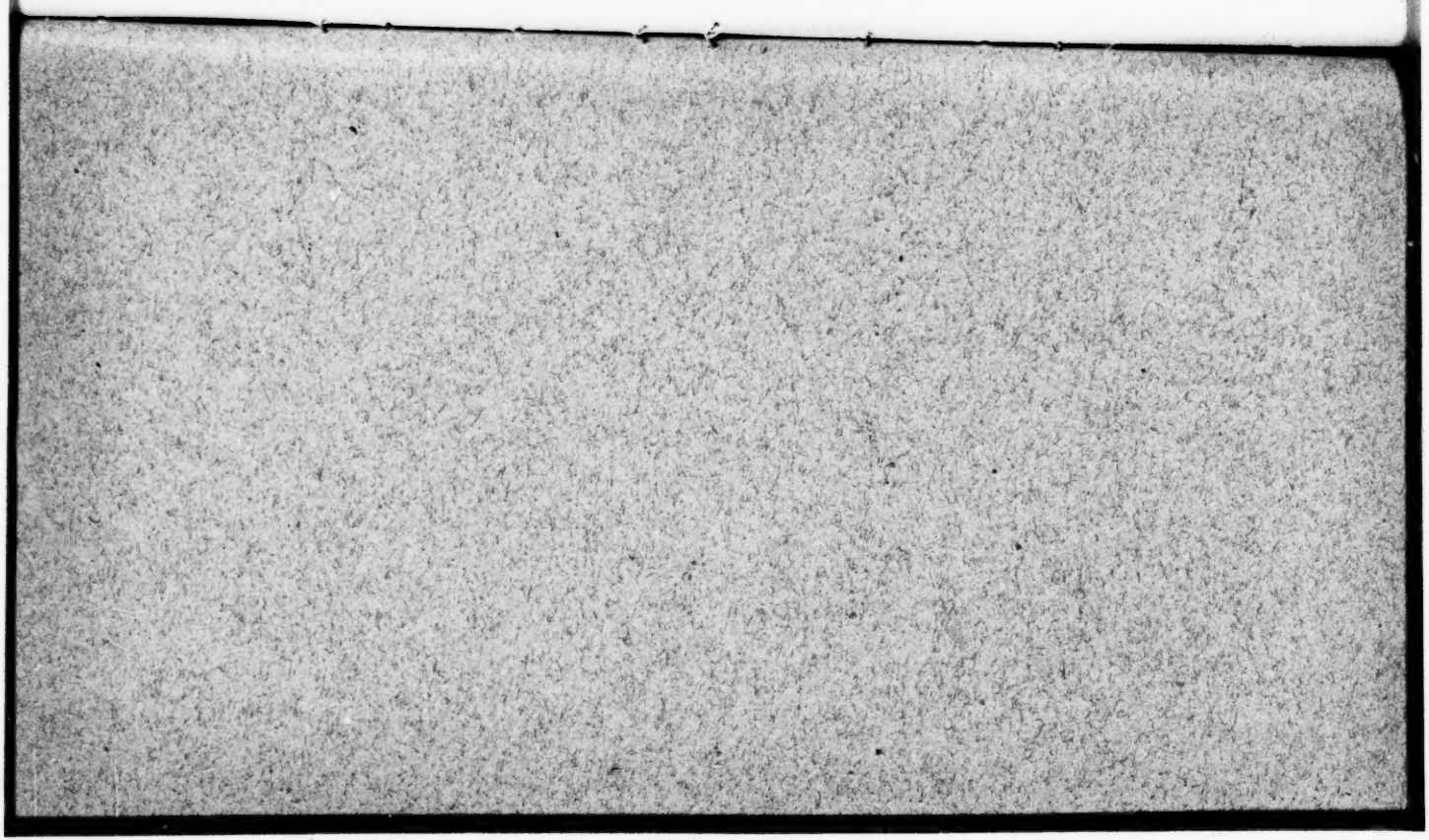
---

## PETITION FOR WRIT OF MANDAMUS.

---

WILLIAM T. THOMPSON,
ATTORNEY GENERAL,
WILLIAM B. ROSE,
DEPUTY ATTORNEY GENERAL,
*Counsel for Petitioner.*

Rees Printing Co., Black Hills Manufacturing and Publishing Company, Inc.



IN THE

# Supreme Court of the United States.

| | |
|---|---|
| UNITED STATES OF AMERICA, EX REL. STATE OF NEBRASKA, *Petitioner,* v. WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA, *Defendants.* | ORIGINAL. |

## PETITION FOR WRIT OF MANDAMUS.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, the State of Nebraska, by William T. Thompson, its attorney general, shows to this honorable court:

Petitioner is one of the sovereign states of the United States and by the very terms of its being as such it has authority to ask in its own name and in its own courts, and especially in the supreme court of Nebraska, any proper assistance in the exercise of its duty to promote the general welfare and to protect its citizens from irrepar-

able injury, oppression or extortion; and petitioner, joining with it as plaintiffs the attorney general and the members of the Nebraska State Railway Commission, in the lawful exercise of such power, brought a suit in equity in the supreme court of Nebraska, June 15, 1907, to enjoin the Chicago, Burlington & Quincy Railroad Company from injuring the public by charging for its *intra*-state services, as a common carrier in the state of Nebraska, unlawful and extortionate rates and from defying Nebraska officers in discharging their lawful duties. Petitioner is not a citizen within the meaning of the removal acts of congress and the suit in equity so brought by the state of Nebraska could not lawfully be removed to a court of the United States.

William T. Thompson is the duly elected, qualified and acting attorney general of the state of Nebraska, and it is his duty as such to bring and prosecute for the state of Nebraska all suits, actions or proceedings in which it is a party or interested.

Honorables William H. Munger and Thomas C. Munger, defendants, are United States district judges for the district of Nebraska.

The Chicago, Burlington & Quincy Railroad Company is a corporation organized and existing under and by virtue of the laws of the state of Iowa, and is a common carrier of freight and passengers in the state of Nebraska. Its main line of railroad crosses the entire state of Nebraska from east to west and in addition to its main line it operates branch lines in many of the counties thereof.

In 1907 the legislature of the state of Nebraska duly enacted, and the governor thereof duly approved, general statutes reducing the Nebraska *intra*-state rate to be charged by railroad companies for transportation of railroad passengers to two cents a mile; fixing the Nebraska *intra*-state freight rates on a number of commodities at eighty-five per cent. of the *intra*-state rates exacted by the

Chicago, Burlington & Quincy Railroad Company in the state of Nebraska, January 1, 1907; forbidding the issuance of free *intra*-state passes in the state of Nebraska; and creating the Nebraska State Railway Commission and conferring upon it power to regulate *intra*-state freight and passenger rates in the state of Nebraska and to prevent rebates and other unlawful discriminations therein. After such statutes had gone into effect and when it was the duty of all common carriers in Nebraska to obey said laws, the Chicago, Burlington & Quincy Railroad Company disobeyed or threatened to violate them and defied the authority of the Nebraska State Railway Commission in the enforcement of such laws.

Prior to the enactment of said statutes the *intra*-state traffic of the Chicago, Burlington & Quincy Railroad Company, in the state of Nebraska, was practically without restraint or control and its influence was then and now is so great, its capacity so formidable and its powers of oppression, discrimination and extortion so varied and far-reaching that individual citizens of the state of Nebraska were and are wholly unable to cope or litigate with it or protect themselves in controversies arising from unreasonable and extortionate charges for transportation of freight and passengers, from rebates, from issuance of free passes and from inefficient or discriminatory service; and in the state of Nebraska the abuses arising from the exercise of such oppressive power and influence of the Chicago, Burlington & Quincy Railroad Company were and are far beyond the ordinary remedies at law, either public or private, civil or criminal, and the state of Nebraska and the people thereof were and are without any adequate remedy in the premises except in a court of equity by means of a suit instituted and maintained by the state of Nebraska against the Chicago, Burlington & Quincy Railroad Company.

After the said statutes of Nebraska had gone into effect

and after it had become the duty of all common carriers of freight and passengers operating in the state of Nebraska, including the Chicago, Burlington & Quincy Railroad Company, to obey such statutes, the state of Nebraska by William T. Thompson, its attorney general, brought in the supreme court of the state of Nebraska, a court of competent jurisdiction, a suit in equity to enjoin the Chicago, Burlington & Quincy Railroad Company from actual or threatened violation of Nebraska laws by putting into effect in Nebraska unlawful *intra*-state passenger rates in excess of those fixed by the Nebraska statute; by putting into effect unlawful rates for *intra*-state transportation of freight in excess of those fixed by the Nebraska statute; and by unlawfully defying the Nebraska State Railway Commission in the performance of official duties imposed upon it by law. The petition filed in the supreme court of the state of Nebraska by the state of Nebraska against the Chicago, Burlington & Quincy Railroad Company, in the said suit, is as follows:

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

| | |
|---|---|
| The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs, v. Chicago, Burlington & Quincy Railway Company, Defendant. | Petition for Injunction. |

Now come plaintiffs, and for cause of action against the defendant, allege:

*First Cause of Action.*

1. William T. Thompson, plaintiff, is the duly elected, qualified and acting attorney general of the state of Nebraska, and it is his duty as such attorney general to bring and prosecute all suits necessary to the proper enforcement of all lawful *intra*-state rates and charges for the transportation of freight and passengers over and upon the various lines of railway companies and common carriers operating in the state of Nebraska.

Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., are the duly elected, qualified and acting railway commissioners of the state of Nebraska, and they are and constitute the Nebraska State Railway Commission, and it is their duty as such under the laws of the state of Nebraska to determine, regulate and enforce proper and lawful *intra*-state rates and charges for the transportation of freight over and upon the railroad lines of all railway companies and common carriers operating in the state of Nebraska, and to enforce therein on such railroads and common carriers all lawful *intra*-state rates and charges for the transportation of passengers in said state, and to prevent discrimination in such *intra*-state freight and passenger rates and charges.

Defendant, Chicago, Burlington & Quincy Railway Company, is a corporation, organized and existing under and by virtue of the laws of the state of Iowa, and is a common carrier of freight and passengers in the state of Nebraska, and is operating lines of railway therein.

By an act of the legislature of the state of Nebraska, passed at the thirtieth session in 1907, known as House Roll No. 267, being "An act to amend sections 1058 and 1059 of Cobbey's Annotated Statutes for the year 1903, to fix a maximum passenger rate and to repeal said sections," which by virtue of an emergency clause went into effect and became a law March 6, 1907, it was made unlawful for any railroad corporation operating in the state of

Nebraska to charge, collect, demand or receive for the *intra*-state transportation of any passenger over twelve years of age, with baggage not exceeding 200 pounds in weight, on any train on its line of road in the state of Nebraska, a sum exceeding two cents per mile, except that no railroad company shall be required to sell any ticket for less than five cents.

Notwithstanding the requirements of said statute, limiting the lawful fare or charge of railroad companies to two cents per mile for each passenger and the duty of defendant to comply with the provisions of said law, defendant threatens to, and will, unless restrained by this court, put in force in the state of Nebraska an unlawful rate for the *intra*-state transportation of passengers in excess of two cents per mile.

2. For another and second cause of action against defendant aforesaid, plaintiffs further allege that by an act of the legislature of the state of Nebraska, passed at the thirtieth session thereof, in 1907, known as Senate File No. 325, entitled "An act to fix the maximum rates to be charged for the transportation of certain property within the state of Nebraska upon and over the lines of railway companies or common carriers within this state and to delegate powers to the State Railway Commission to regulate the same and to provide penalties for the violation of this act and to repeal article 12 of chapter 72 of the Compiled Statutes of Nebraska for the year 1905," it was made unlawful for any railroad company or common carrier operating or doing business in the state of Nebraska to charge, collect or receive for the transportation of live stock, potatoes, grain, grain products, fruit, coal, lumber, or building materials in carload lots within the state of Nebraska, more than 85 per cent. of the fixed amount in the classification or schedule of said railroad company or common carrier for transportation of property in force and effect on their various lines of railway January 1,

1907, until after the said railway commission shall have provided a greater rate upon any article or property in such schedules from the rate fixed by Senate File No. 325, which was approved April 8, 1907, and which said act will become a law and go into effect July 5, 1907.

Notwithstanding the requirements of such Senate File No. 325, making it unlawful for any railroad company or any common carrier within the state of Nebraska to charge, collect, or receive for the *intra*-state transportation of live stock, potatoes, grain, grain products, fruit, coal, lumber, or building materials in carload lots within the state of Nebraska more than 85 per cent. of the fixed amount in the classifications and schedules of freight charges in force January 1, 1907, and that said reduction in rates will become effective July 5, 1907, and nothwithstanding the duty of defendant to comply with the requirements of said act when it goes into effect and to prepare schedules and furnish and equip its agents with the same to enable them to meet the requirements of said law, defendant threatens thereafter to put in force in the state of Nebraska unlawful *intra*-state rates in excess of the rates limited by said Senate File No. 325, and threatens to disregard the provisions of said Senate File No. 325, and is neglecting to prepare its schedules in conformity therewith and is threatening to put in force after July 5, 1907, rates in excess of those lawfully fixed by said Senate File No. 325, and before the said Nebraska State Railway Commission shall have had time and an opportunity to exercise its power to hear and determine whether or not the freight rate upon any articles so reduced is either so high as to be unjust to shippers or so low as to be unremunerative or unjust to defendant, and to make such order in the premises as is demanded by the facts.

3. For a further and third cause of action plaintiffs allege that the defendant aforesaid, in violation of law, has issued and is at the present time issuing and is threat-

ening to issue and give to persons, through its officers and agents, and will continue to give and issue, unless restrained and enjoined by this court, free transportation, free passes, and free tickets over the lines of its said road in the state of Nebraska, which persons to whom said free tickets, free passes and free transportation have been given, are being given, and are threatened to be given, are not officers, agents and bona fide employees of said company, the major portion of whose time is devoted to the service of the company, children under seven years of age, officials and linemen of telegraph companies, ex-employees, retired from service on account of age, or because of disability sustained while in the service of said railroad company, and dependent members of their immediate families, widows or dependent children of employees killed while in the service of such railroad company, necessary care-takers of live stock, poultry, vegetables and fruit, employees of sleeping car companies and express companies, railway mail service employees; newsboys on trains, baggage agents; persons injured in wrecks; physicians, and nurses attending the same; officers, agents, employees and dependent members of their families of other railroad companies exchanging transportation, or to persons with the object of providing relief in cases of general epidemic, pestilence or calamitous visitations, in violation of law; and plaintiffs further allege that defendant in violation of law has issued and is now issuing and threatens to issue *intra*-state passes, mileage, tickets and transportation which give to the recipients thereof an unfair and unlawful advantage over others and thus discriminate in favor of some passengers and against others and under false and fraudulent pretext attempt to evade and cheat the laws of the state of Nebraska.

4. For a further and fourth cause of action, the plaintiffs allege that defendant, in violation of law, has defied the lawful orders of the said Nebraska State Railway

Commission and has denied its authority to regulate *intra*-state freight and passenger rates on its lines of railway in the state of Nebraska and has denied the authority of said Nebraska State Railway Commission to make and enforce its orders, and by concealment has attempted to evade the laws of Nebraska and the orders of said Nebraska State Railway Commission and has refused to disclose the true condition of its business and the facts demanded by the Nebraska State Railway Commission, and has concealed from the said Nebraska State Railway Commission and the people of the state of Nebraska the true condition of its affairs as a common carrier of freight and passengers in the state of Nebraska.

All of said unlawful acts and threatened acts are contrary to equity and good conscience and to the manifest injury of the plaintiffs in the premises and to the people of the state of Nebraska, that the wrongs and threatened acts of defendant are irreparable and plaintiffs are without adequate remedy except in a court of equity:

Wherefore, plaintiffs pray that the defendant, its officers, agents, attorneys, servants and employees be enjoined from making or putting into effect any other or different *intra*-state rate or charge for the transportation of passengers over its line or lines of railroad in the state of Nebraska than two cents per mile for each passenger, and that it be restrained from interfering with or changing the rate established by law.

2. That defendant, its attorneys, agents, servants, and employees be restrained and enjoined from putting into effect, charging or receiving, after July 5, 1907, for the *intra*-state transportation of live stock, potatoes, and grain, grain products, fruit, coal, lumber, or building materials in car load lots within the state of Nebraska, more than 85 per cent. of the rates charged and in force on its various lines of railway within the state of Nebraska January 1, 1907, until after the said Nebraska State Rail-

way Commision shall have provided a greater rate upon any article or property than that fixed by said Senate File No. 325.

3. That defendant, its attorneys, agents, servants and employees be restrained and enjoined from disobeying the lawful orders of said Nebraska State Railway Commission heretofore made and from concealing from said Nebraska State Railway Commission the true condition of its business in *intra-state* transportation of passengers and freight on its several lines of railroad in the state of Nebraska.

4. That defendant, its attorneys, agents, servants, and employees be restrained and enjoined from making any unlawful discrimination in issuing *intra*-state passes, mileage, tickets, and transportation over its lines of railroad in the state of Nebraska, and that plaintiffs may be granted such other and further relief as equity and good conscience may require.

STATE OF NEBRASKA,
WILLIAM T. THOMPSON,
HUDSON J. WINNETT,
J. A. WILLIAMS,
HENRY T. CLARKE, JR.,
By WILLIAM T. THOMPSON,
*Attorney General.*
W. B. ROSE, *Deputy.*
GRANT G. MARTIN, *Assistant.*

State of Nebraska, } ss.
Lancaster County. }

William T. Thompson, being first duly sworn, deposes and says that he is the duly elected, qualified and acting attorney general for the state of Nebraska and one of the plaintiffs in the above entitled cause; that he knows the facts stated in the above and foregoing petition, and says that the same are true as he verily believes.

WILLIAM T. THOMPSON.

Subscribed in my presence and sworn to before me, this 15th day of June, A. D. 1907.

H. C. LINDSAY,
[SEAL.] *Clerk Supreme Court.*

The foregoing petition was filed in said supreme court June 15, 1907, process was duly issued and served on defendant therein, and the supreme court acquired original jurisdiction thereby by virtue of section 2, article 6 of the constitution of the state of Nebraska, which is as follows:

"The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision. It shall have original jurisdiction in cases relating to the revenue, *civil cases in which the state shall be a party*, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

By construction of the supreme court of the state of Nebraska in the case of *State v. Exchange Bank of Milligan*, 34 Neb., 200, the adjudication that a pecuniary or monetary interest of the state is not a prerequisite of its right or power to become a plaintiff in a civil suit in the state supreme court, was an interpretation by the court of final authority in said state of said section 2, article 6, of the Nebraska constitution.

Under the constitution and laws of the state of Nebraska the supreme court acquired original jurisdiction of the matters pleaded in the foregoing petition in said state court solely by reason of the fact that the state of Nebraska is a party, and to give the supreme court of Nebraska jurisdiction in said case it was unnecessary to allege in the petition the capacity or character of the state of Nebraska. Neither was it necessary to show in the petition that the state has a pecuniary or property interest in the controversy. Plaintiffs William T. Thompson, attorney general, the Nebraska State Railway Commis-

sion, Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, are nominal parties merely and have no individual or private interest therein, but each of said officers and said Nebraska Railway Commission in becoming plaintiffs truly represent the state of Nebraska in an official capacity for the sole purpose of invoking the power and jurisdiction of the supreme court of Nebraska on behalf of the state of Nebraska, and the state of Nebraska is the only real party plaintiff in said suit, and said supreme court under said constitutional provision, as construed by it, could acquire no original jurisdiction over said officers as plaintiffs, or over the Chicago, Burlington & Quincy Railroad Company as defendant, or over the subject-matter of said suit, except for the fact that the state of Nebraska is a real party plaintiff therein.

June 22, 1907, the Chicago, Burlington & Quincy Railroad Company appeared in said cause and filed therein a petition for removal of the same to the circuit court of the United States for the district of Nebraska, Lincoln Division, a copy whereof follows:

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska,

Plaintiffs,

v.

Chicago, Burlington & Quincy Railway Company,

Defendant.

PETITION FOR REMOVAL TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

*To the Honorable, the Judges of the Supreme Court of the State of Nebraska:*

Your petitioner, Chicago, Burlington & Quincy Railway Company, most respectfully shows that it is the defendant in the above entitled action; that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; that the said suit is of a civil nature and is an action brought by the plaintiffs against your petitioner.

Your petitioner further avers that in the above entitled suit there is a controversy which is wholly between citizens of different states, to wit: a controversy between your petitioner, Chicago, Burlington & Quincy Railway Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been and now is a corporation created and existing under and by virtue of the laws of the state of Iowa; the said William

T. Thompson, Attorney General of the state of Nebraska, one of the plaintiffs, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska; the Nebraska State Railway Commission, a board organized under the laws of the state of Nebraska for the supervision of railways in said state, and the members composing the said board, whom your petitioner avers were, at the time of the commencement of this suit, ever since have been and still are citizens and residents of the state of Nebraska; the said Hudson J. Winnett, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska; the said J. A. Williams, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska, and the said Henry T. Clarke, Jr., one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska. And your petitioner avers that it was not at the time of the commencement of this suit, nor since has been and is not now a resident or citizen of the state of Nebraska.

Your petitioner further avers that the state of Nebraska as a party plaintiff in the said suit, is not a proper or necessary party in the said suit; that the said state of Nebraska is not the real party in interest in the said suit; that the said state of Nebraska has no interest, beneficial or otherwise, in the said suit, and has been named as a party plaintiff simply for the purpose of depriving the circuit court of the United States of jurisdiction over this suit.

Your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States for the district of Nebraska, Lincoln division, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if the said court should hold that this suit was wrongfully or improperly brought thereto, and it prays this court to proceed no further herein, except to make an order for removal and to accept the said surety and bond and to cause the record herein to be removed in the said circuit court of the United States within and for the district of Nebraska, Lincoln division.

Chicago, Burlington & Quincy Railway Company,
By Charles F. Manderson,
Charles J. Greene,
Frank E. Bishop, and
Ralph W. Breckenridge,
*Its Attorneys.*

State of Nebraska, } ss.
County of Lancaster. }

Ralph W. Breckenridge, being first duly sworn on his oath deposes and says that he is one of the attorneys for the defendant, Chicago, Burlington & Quincy Railway Company, in the above entitled cause; that he has read the foregoing petition, knows the contents thereof and that the statements therein contained are true as he verily believes. Ralph W. Breckenridge.

Subscribed in my presence and sworn to before me this 21st day of June, 1907. Victor Seymour,
(Seal.) *Notary Public.*

In connection with said petition for removal a duly approved removal bond was by defendant in said cause filed in said supreme court June 22, 1907.

July 3, 1907, a duly authenticated transcript of the supreme court of Nebraska in the said cause of the state

of Nebraska and others against the Chicago, Burlington & Quincy Railroad Company was by said defendant filed in the Lincoln division of the circuit court of the United States for the district of Nebraska, and said cause, by due course of procedure, was fully removed to said circuit court. Whereupon, the state of Nebraska, July 12, 1907, filed in said circuit court a motion to remand, in the following language:

"IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN AND FOR THE DISTRICT OF NEBRASKA.

LINCOLN DIVISION.

| | |
|---|---|
| The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, Plaintiffs, v. Chicago, Burlington & Quincy Railway Company, Defendant. | Motion to Remand. |

Come now the plaintiffs in the above entitled cause and move the court to remand the same to the supreme court of the state of Nebraska, for the following reasons:

1. This court has no jurisdiction to hear and determine the cause.

2. This court has no jurisdiction over the subject-matter set forth and contained in plaintiffs' petition.

3. This court has no jurisdiction of the parties herein, nor of any of them.

W. T. Thompson,
*Attorney General,*
W. B. Rose,
Grant G. Martin,
*Attorneys for Plaintiffs.*"

Upon a hearing of said motion before Honorables William H. Munger and Thomas C. Munger, United States district judges for the district of Nebraska, sitting *in banc* in the circuit court of the United States in the Lincoln division of said district of Nebraska and holding the circuit court of the United States for said district of Nebraska, the said judges September 25, 1907, overruled the said motion to remand said cause commenced in said supreme court by the state of Nebraska and others against the Chicago, Burlington & Quincy Railroad Company and retained jurisdiction thereof in the said circuit court and will unless commanded by this court to remand said cause to said state supreme court, compel the state of Nebraska either to abandon its said suit in its own name or to proceed to a trial on the merits of the case in said circuit court, where all the proceedings and orders will be absolutely null and void for want of jurisdiction. The opinion of said United States district judges on said motion to remand is here reproduced, as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska,
Plaintiffs,
v.
Chicago, Burlington & Quincy Railway Company,
Defendant.

Same Plaintiffs,
v.
Missouri Pacific Railway Company.

Memorandum Opinion.

Same Plaintiffs,
v.
Union Pacific Railroad Company.

Same Plaintiffs,
v.
Chicago, Rock Island & Pacific Railway Company.

W. T. Thompson, Attorney General, and W. R. Rose, Deputy Attorney General, Attorneys for Complainants.
James Kelby and W. D. McHugh, Attorneys for Chicago, Burlington & Quincy Railway Company.
R. P. Wagoner, Attorney for Missouri Pacific Railroad Company.
John N. Baldwin, Edson Rich, and W. D. McHugh, Attorneys for Union Pacific Railroad Company.
W. D. McHugh, Attorney for Chicago, R. I. & P. R. R. Co.
Before W. H. Munger and T. C. Munger, District Judges.

T. C. MUNGER, D. J.

These cases all involve the same questions.

The legislature of the state of Nebraska passed an Act, approved March 2, 1907, conferring powers and duties upon the State Railway Commission, and providing that said commission should have the power to regulate the rates and services of and to exercise a general control over all railroads within the state, and further providing that said commission should have the power, and it should be its duty, to make all necessary classifications and to fix all necessary rates, charges, and regulations to govern and regulate the freight and passenger tariffs of railway companies, with power to correct abuses and correct unjust discriminations, extortions, and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having certain penalties provided by the act inflicted, through proper courts having jurisdiction. Section 2*b-d*.

By section 11 of the same act it is provided that if any railroad company shall violate, refuse or neglect to obey any orders of the commission, the commissioner or any company or person interested in such orders may apply in a summary way, by petition, to the district court of the county in which the violation or disobedience shall happen, and that court is given the power to hear and determine the matter in a summary way, as a court of equity.

The Nebraska legislature also passed an act, approved March 6, 1907, making it unlawful for any railroad operating in the state to charge more than two cents per mile for the transportation of passengers over the lines of road in the state.

The legislature also passed another act, approved April 8, 1907, making it unlawful for any railway company to charge for the transportation of live stock, potatoes, grain and grain products, fruit, coal, lumber, or building material, in carload lots, within the state of Nebraska, more than eighty-five per cent. of the amount fixed in the classification and schedules of such railway companies, for the transportation of such property in force and effect on their various lines of railway on the first day of January, 1907, until after the State Railway Commission shall have provided a greater rate on any article or property in such schedule.

The legislature further passed an act, approved March 30, 1907, making it unlawful for any railroad company operating any line of railroad in the state of Nebraska directly or indirectly to issue or give to any person or persons, with certain exceptions, any free ticket, free pass, or free transportation, in any form, for transportation over any lines of railroad in the state of Nebraska.

Following the enactment of these laws, this action was begun in the supreme court of the state of Nebraska, and in the petition the plaintiffs are named as follows: The state of Nebraska; William T. Thompson, Attorney Gen-

eral; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, of the state of Nebraska,—and it is alleged that the plaintiff William T. Thompson is the attorney general of the state of Nebraska, and that it is his duty as such attorney general to bring and prosecute all suits necessary for the proper enforcement of all lawful *intra*-state rates and charges for transportation of freight and passengers within the state of Nebraska; that Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., are the railway commissioners of Nebraska, and that it is their duty as such, under the laws of Nebraska, to determine, regulate, and enforce proper and lawful *intra*-state rates and charges for the transportation of freight over railroad lines in the state of Nebraska, and to enforce thereunder on such railroads all lawful *intra*-state rates and charges for the transportation of passengers.

No further interest of the state of Nebraska appears except such as arises from implication from the pleading of the foregoing facts.

The petition alleges that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Iowa, and that the defendant threatens to put in force in the state of Nebraska an unlawful rate for the transportation of passengers, exceeding two cents per mile.

For a second cause of action the plaintiff alleges that the defendant threatens to put in force unlawful freight rates in excess of the rate of eighty-five per cent. of the amount of the classifications and schedules of freight charges in force January 1, 1907.

For a third cause of action the plaintiff alleges that the defendant has unlawfully issued and is issuing and threatens to issue to persons free transportation, free passes, and free tickets, in violation of the act of the legislature approved March 30, 1907.

The fourth cause of action alleges that the defendant has unlawfully defied the lawful orders of the State Railway Commission and its authority to regulate freight and passenger rates in the state of Nebraska and to make and enforce its orders, and has refused to disclose the true condition of its business, as required by law.

The prayer of the petition is for an injunction restraining the defendant from violating the several laws and orders alleged in the petition.

The case was removed to this court upon the petition of the defendant, and a motion to remand the same to the state supreme court has been submitted.

The question involved in this case is whether the action is one that may be removed into the United States circuit court. The solution of this question depends on the construction of the act of congress of March 3, 1887, which gives cognizance to the circuit courts of the United States of "all suits of a civil nature, at common law or in equity * * * in which there shall be a controversy between citizens of different states, in which the matter in controversy exceeds, exclusive of interest and costs" the sum of two thousand dollars.

The complainants contend that the action does not come within the statute for the reason that the act of congress refers only to controversies between citizens of different states, and not to controversies between the state and citizens. The fact that the suit is brought in the name of the state does not determine whether or not it is really a party in interest.

In the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, the states were named as parties plaintiff and defendant, but the court on an examination of the cases as stated in the pleading held that the states as plaintiffs were not suing for their own benefit, but for the benefit of certain individuals, and that the court would look through and behind the nominal parties

on the record to ascertain who were the real parties to the suit.

In the later case of *In re Ayers*, 123 U. S. 492, the court held that although the state was not named as a party, yet it was actually the real party in interest, and said, "Whether it is the actual party, in the sense of the prohibition of the constitution, must be determined by a consideration of the nature of the case as presented in the whole record."

The complainants' bill does not allege that any pecuniary interest of the state is affected. In the arguments of complainants the only interest of the state claimed to be involved is its governmental interest in the welfare of its citizens, and it is declared that a state has the right to enjoin a violation of the law. Most of the cases cited to sustain this doctrine do not go that far.

*In re Debs*, 158 U. S. 584, was a case where the right of the United States to prosecute an action was sustained upon the right to control the carriage of the United States mail, and the further right to enjoin a nuisance. No such question is here involved.

A number of English decisions are cited, but from an examination of these cases it appears that the right of the attorney general or other representative of the government to maintain those actions arose from the fact that the defendants were maintaining a nuisance, or acting in excess of their corporate powers. No English case is cited where it was held that the government could maintain an action for an injunction on the sole ground of its interest in the welfare of its citizens. The jurisdiction of the courts to inquire by proceedings in the nature of *quo warranto* into alleged usurpations of authority, is beyond question, but no such question is here presented.

Other cases cited, *Stockton v. Central R. Co.*, 50 N. J. Eq., 80; *Trust Co. v. Georgia*, 109 Ga., 748; *Louisville v. Commonwealth*, 97 Ky., 695, were also cases to restrain

acts of corporations in excess of their chartered powers, while the case of *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass., 363, was a case where the defendant was both exceeding its power and creating a nuisance.

In the case of *Attorney General v. Railway Companies*, 35 Wis., 550, and in the case of *Hickman v. Missouri, K. & T. R.*, 151 Mo., 644, 52 S. W., 351, the interest of the state in an action similar to this is vigorously upheld. In the latter case, a statute of Missouri was involved, which gave to a board of railway commissioners similar powers to those conferred by the Nebraska statute. The Missouri Railway Commissioners had made an order reducing rates of toll over the Booneville bridge and on failure to comply with this order they brought suit to compel compliance with the order. This cause was removed to the United States Circuit Court, but the state court proceeded with the case. The cause was taken on error to the supreme court of the United States and the same contention was made, that the state was really a party in interest in the action, and hence it was not such an action as could be removed from the state to the United States court. In passing upon this question the supreme court of the United States said (183 U. S., 53):

"It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362-390."

In the case of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 390, it was likewise contended that the state

was the real party in interest, because the action was one to restrain the State Railway Commission and attorney general from enforcing certain rates for transportation of freight. In passing upon the question the supreme court of the United States said:

"Appellants invoke the doctrines laid down in these two quotations and insist that this section cannot be maintained because the real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates is the state, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the federal court. We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection, illegal in whole or in part."

These cases are decisive of the question involved in the case before us, and it is incumbent on this court to follow the rule of law so authoritatively stated.

The case of *Fitts v. McGee*, 172 U. S., 516, is not applicable to the case at bar, because that action sought to enjoin the Attorney General of Alabama and the solicitor of the Eleventh Judicial Circuit from instituting certain criminal prosecutions. In such actions the state was clearly a party in interest.

The case of *Arkansas v. Kansas*, 183 U. S., 185, is likewise inapplicable in this controversy. In the language of the Chief Justice, "The gravamen of the bill was the injury to the health, morals, peace and good order of the town and county." The state was thus properly a party plaintiff in the assertion of its police power.

In the late case of *Georgia v. Tennessee Copper Co.*, 27 Sup Ct. R., 618, the state of Georgia was held to have the right to enjoin the pollution of the atmosphere and the destruction of vegetation over a large portion of its territory, but this was for the reason that the state, as a sovereign, had a property interest in its domain. In this case there is no property right of the state involved, nor is this suit brought in aid of the police power, nor as a direct prosecution or suit for penalties, and the state as an artificial person has no real interest in the action.

It is further contended that the subject matter of the suit is such that the federal court cannot properly administer the Nebraska statutes involved. This question necessarily was involved in the case of *Missouri K. & T. R. Co. v. Missouri Railroad Commissioners*, 183 U. S., 53, above cited. In that case the Board of Railway Commissioners was proceeding by an action in the state court to carry out the peculiar provisions of the Missouri statute. The method provided was similar to the terms of the Nebraska statute in this case. In the case now under consideration the suit is not one to execute the statutory provisions of this state, but is one asserted on general equitable principles to enjoin a threatened violation of law and no reason is perceived why the United

States court may not deal with the subject matter as fully as the state court.

It is also contended that in case of doubt it is the duty of this court to remand the case to the state court. This is not the rule of the circuit court of appeals for this circuit. *Boatmen's Bank v. Fritzlen*, 135 F., 650. But no doubt is entertained that the state of Nebraska in this case has no real interest as an artificial person and therefore the motion to remand will be overruled.

W. H. Munger, District Judge, concurs.

Judgment of the United States circuit court for the district of Nebraska was on September 25, 1907, rendered pursuant to said opinion, as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

LINCOLN DIVISION.

Present: Thomas C. Munger and William H. Munger, JJ.

The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska,

Plaintiffs.

v.

Chicago, Burlington & Quincy Railroad Company,

Defendant.

And now, September 25, 1907, this cause on a former day of a session of this court having been argued by counsel for both parties, on motion of the state of Nebraska to remand the cause to the supreme court of the

state of Nebraska for want of jurisdiction, and the said motion having been taken under advisement, and the court now being fully advised in the premises, it is ordered and decreed that the said motion be, and the same hereby is, overruled. William H. Munger, J., concurring. To this ruling and order the state of Nebraska excepts.

Thomas C. Munger,
*District Judge.*

The right of removal asserted by the Chicago, Burlington & Quincy Railroad Company, in the said suit commenced in said state court, is based on that part of section 1 of the removal acts of Congress containing the following language:

"That the circuit court of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." (25 Stat. L., 434.)

Petitioner shows to this court that the state of Nebraska is not a citizen within the meaning of the said removal acts, that said removal acts have no application to a suit in the supreme court of Nebraska wherein the state of Nebraska is a party, and this interpretation of the removal acts of Congress is by repeated decisions the settled doctrine of this court.

Petitioner further shows that notwithstanding the state of Nebraska is a party to said suit and is not a citizen within the meaning of said removal act of Con-

gress, that the Attorney General and the members of said railway commission are merely nominal parties plaintiff and could not bring or maintain said suit in the supreme court except for the fact that the state is a real party plaintiff, and that the circuit court of the United States for the district of Nebraska did not and cannot acquire jurisdiction of said cause by removal, yet the said United States district judges have decided and determined to retain said cause in the said circuit court and to assume and exercise jurisdiction over the same by reason of said removal, and said circuit court will retain jurisdiction by its said decision on said motion and has and will assume and exercise jurisdiction over said suit so removed, and will assert and attempt to exercise jurisdiction over said suit, beyond and in excess of the jurisdiction conferred upon said circuit court by the Constitution and laws of the United States and in utter disregard of the right and power of the state of Nebraska as a sovereign to bring and prosecute in its own courts any proper suit to promote the general welfare and to protect its citizens from injuries, oppressions or extortions; and the said circuit court of the United States unless commanded by a writ of mandamus to remand said cause will, by said usurpation of power and such unlawful assumption of jurisdiction, compel the state of Nebraska to either abandon its said suit brought in its own court to promote the general welfare and to protect its citizens from the injuries, oppressions and extortions of the Chicago, Burlington & Quincy Railroad Company, or to submit to the wrongful and unlawful assertion and exercise by said circuit court of a usurpation of jurisdiction, where all the proceedings, rulings, orders and judgments of said circuit court will be absolutely without jurisdiction and void.

Petitioner further shows and submits to this honorable court that by removal under the acts of Congress afore-

said the said circuit court of the United States for the district of Nebraska could, in any event, acquire only such power or jurisdiction over the parties and subject-matter as was possessed by the state court from which it was removed; and that by the Constitution of said state of Nebraska original jurisdiction in said Nebraska supreme court is conferred in civil cases only when the state is a real, necessary and *bona fide* party and suitor. And so petitioner submits that if the construction held by defendants, that the state is a nominal party only, be maintainable, it must of necessity follow that the said Nebraska supreme court was, by the Constitution of Nebraska, without any original jurisdiction over the parties or subject-matter of said suit, and that said circuit court of the United States acquired no jurisdiction by said removal proceedings.

Petitioner further shows to this court that the state of Nebraska has no adequate remedy in the premises except by means of a writ of mandamus issued out of this honorable court, to compel the remanding of said cause to the supreme court of Nebraska, from whence it was removed.

WHEREFORE, petitioner, the state of Nebraska, the aid of this honorable court most respectfully requesting, prays that a writ of mandamus may issue to the said Honorables William H. Munger and Thomas C. Munger, United States district judges for the district of Nebraska, sitting in said Lincoln division and holding the circuit court of the United States in and for the district of Nebraska, directing and commanding them to remand to the supreme court of the state of Nebraska the said suit brought in the supreme court of the state of Nebraska, wherein the State of Nebraska, William T. Thompson, Attorney General, Nebraska State Railway Commission, Hudson J. Winnett, J. A. Williams and Henry T. Clarke,

Jr., as members of the Nebraska State Railway Commission, are plaintiffs, and the Chicago, Burlington & Quincy Railroad Company is defendant.

The State of Nebraska
*Petitioner.*

*By*

....., *Attorney General.*

....., *Deputy Attorney General*
*Of Counsel for Petitioner.*

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief

.....
*Of Counsel for Petitioner.*

STATE OF NEBRASKA, ss.

William T. Thompson, being first duly sworn, on oath says he is the Attorney General of the State of Nebraska, the petitioner in the foregoing petition, and as such was counsel for the State of Nebraska in the supreme court of the State of Nebraska and also in the circuit court of the United States for the district of Nebraska in the suit mentioned in the foregoing petition, wherein the State of Nebraska and others are plaintiffs and the Chicago, Burlington & Quincy Railroad Company is defendant; that he is acquainted with the facts stated in the petition of the State of Nebraska in the supreme court of Nebraska and also with the facts stated in the foregoing petition.

and that the matters and things stated in both of said petitions are true as he verily believes.

.....

Subscribed in my presence and sworn to before me this.....day of.....A. D. 1907.

.....

*Clerk of Supreme Court of Nebraska.*

No. 15. Original.

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

UNITED STATES OF AMERICA, EX. REL. STATE OF NEBRASKA,

*Petitioner,*

v.

WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA,

*Defendants.*

---

*ORIGINAL APPLICATION FOR MANDAMUS.*

---

## BRIEF AND ARGUMENT OF PETITIONER.

---

WILLIAM T. THOMPSON,
Attorney General,
WILLIAM B. ROSE,
Deputy Attorney General,
*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States.

| | |
|---|---|
| UNITED STATES OF AMERICA, EX REL. STATE OF NEBRASKA. *Petitioner,* v. WILLIAM H. MUNGER AND THOMAS C. MUNGER, UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF NEBRASKA, *Defendants.* | ORIGINAL. |

## ORIGINAL APPLICATION FOR MANDAMUS.

### BRIEF AND ARGUMENT OF PETITIONER.

### STATEMENT.

This is an original application by the State of Nebraska for a writ of mandamus directing Honorables William H. Munger and Thomas C. Munger, United States District Judges for the District of Nebraska, to remand to the supreme court of the State of Nebraska, a case wherein the State of Nebraska, William T. Thompson, attorney general, Nebraska State Railway Commission, Hudson J.

Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, are plaintiffs, and the Chicago, Burlington & Quincy Railroad Company is defendant. The cause was commenced in the supreme court of Nebraska and one of the purposes of the suit was to enjoin the defendant therein by injunction from violating a Nebraska statute by putting into effect unlawful *intra*-state passenger rates in Nebraska in excess of the lawful statutory rates. The act which the Chicago, Burlington & Quincy Railroad company thus violated or threatened to disobey is known as House Roll No. 267, went into effect March 6, 1907, and the material parts thereof are as follows:

"It shall be unlawful for any railroad corporation operating, or which shall hereafter operate, a railroad in this state to charge, collect, demand, or receive for the transportation of any passenger over twelve years of age, with baggage, not exceeding two hundred pounds in weight, on any train over its line of road in the state of Nebraska, a sum exceeding two cents per mile, Provided, that no railroad company shall be required to sell any ticket for less than five cents. (Sec. 1.)

"Said railroad corporation shall not charge, collect, demand or receive within the limits above specified for the transportation of any child under twelve years old in the care or control of any passenger on any train a sum exceeding one-half of the rates prescribed in section 10058 (1) of this act." (Compiled Statutes of Neb. 1907, ch. 72, art. 9, secs. 1 and 2.)

Another purpose of the suit in the state court was to enjoin the Chicago, Burlington & Quincy Railroad Company from putting into effect in Nebraska unlawful *intra*-state rates for the transportation of freight in excess of those fixed by a Nebraska statute, known as Senate File No. 325. This act went into effect July 5, 1907, and the material parts thereof are as follows:

"Section 1. It shall be unlawful for any railway com-

pany or common carrier, operating or doing business in the State of Nebraska, to charge, collect or receive for the transportation of live stock, potatoes, grain and grain products, fruit, coal, lumber or building material in carload lots, within the State of Nebraska, more than eighty-five per cent (85%) of the amount fixed in the classification and schedules of such railway companies or common carriers for the transportation of such property in force and effect on their various lines of railway on the first day of January, 1907, until after the State Railway Commission shall have provided a greater rate upon any article or property in such schedules from the rate herein fixed.

"Sec. 2. The State Railway Commission shall have the power to hear and determine whether or not the freight rate upon any article or articles in such schedule or classification of rates is either so high as to be unjust to shippers, or so low as to be unremunerative or unjust to any common carrier effected thereby, and upon complaint, in writing of any person or corporation effected thereby, particularly specifying the article or articles upon which such rates are either too high or too low and the facts in connection therewith, said Railway Commission shall set such cause for hearing and upon a trial thereon and a full hearing after notice thereof, shall either raise or lower the rate herein fixed upon such article or articles to the end that the same shall be just and reasonable to all parties concerned.

"Sec. 3. Any railway company or common carrier violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall forfeit and pay a fine of not less than ten thousand dollars ($10,000.00) nor more than fifty thousand dollars ($50,000) for each offense." (Compiled Statutes of Neb. 1907, ch. 72, art. 12.)

Another purpose of the action by the State of Nebraska in the supreme court was to enjoin the Chicago, Burlington & Quincy Railroad Company from issuing *intra*-state free passes for transportation of passengers in Nebraska in violation of a Nebraska statute known as Senate File No. 2. This act went into effect March 30, 1907, and the material parts thereof are as follows:

"It shall be unlawful for any railroad company or corporation, owning or operating any line or lines of railroad in the state of Nebraska, or any officer or agent of any such company or corporation, to directly or indirectly issue or give to any person or persons any free ticket, free pass, or free transportation in any form, for the transportation of any passenger, or passengers, on or over any line or lines of railroad or any part thereof, so owned or operated by it, in the state of Nebaska, except to persons within the classes hereinafter designated and limited; and it shall also be unlawful for any person or persons not included within the classes hereinafter designated and limited, to accept or use any such free ticket, free pass, or free transportation in any form for travel on and over any line or lines of railroad or any part thereof in the state of Nebraska. Provided, however, that nothing contained in this act shall be construed to prohibit or make unlawful the issuing or giving of any such free ticket, free pass or free transportation, to any person or persons within the classes herein designated and limited, or the acceptance or use of the same by persons within such classes, viz.: officers, agents, bona fide employees, the major portion of whose time is devoted to the service of such railroad company and the dependent members of their immediate families; children under seven (7) years of age; officials and linemen of telegraph companies; ex-employees retired from service on account of age, or because of disability sustained while in the service of said railroad company and the dependent members of their immediate families, or the widows or dependent children of employees, killed while in the service of such railroad company; necessary caretakers of live stock, poultry, vegetables and fruit including transportation to and from the point of delivery; employees of sleeping car companies, and express companies, and railway mail service employees, news boys on trains, baggage agents, and persons injured in wrecks and physicians and nurses attending them.

"Provided, that one trip pass for a discharged employee and his family may be issued for use within thirty days of such discharge.

"Provided further, that the provisions of this act shall not be construed to prohibit and make unlawful the inter-

change of passes for the officers, agents and employes and the dependent members of their immediate families, of other railroad companies; nor to prohibit any railroad company from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or calamitous visitation.

"Hereafter it shall be the duty of said railroad corporations, and each of them, to cause to be filed not later than the 10th day of each month, with the State Railway Commission, a monthly statement giving the names and addresses of all persons to whom free tickets, free passes or free transportation have been given or furnished by said railroad corporation, specifying the kinds of employment in which such persons are engaged, and designating under which of the exceptions of this act such free tickets, free passes, or free transportation have been given or furnished said person.

"Any railroad company or corporation, or any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and for each offense, on conviction thereof, shall pay a fine of not less than one hundred dollars nor more than one thousand dollars." (Compiled Statutes of Nebraska, 1907, secs. 7 and 8, ch. 72, art. 9.)

A further purpose of the suit by the State of Nebraska in the state court was to enjoin the defendant therein from making discriminations in rates and service and from disobeying and defying the lawful orders of the Nebraska State Railway Commission. These acts of the Chicago, Burlington & Quincy Railroad Company were made unlawful by a Nebraska statute defining the powers and duties of the Nebraska State Railway Commission and making discriminations in rates and services of common carriers unlawful. This act is known as House Roll No. 305, or the "Railway Commission Statute." The title of this bill is:

"An Act, creating and defining the powers, duties and qualifications of the State Railway Commission and the secretary thereof and fixing their compensation; defining

railway companies and common carriers, regulating the same, and providing the method of fixing, establishing, publishing rates, charges and classifications for the transportation of passengers, freights and cars, including joint through rates and joint traffic arrangements, over and upon the various lines of said railway companies and common carriers in this state; to provide for a system of annual reports by common carriers; the method of making, establishing and enforcing the general orders of said commission; defining unjust discriminations; to provide penalties for the violation of the provisions of this act, and to repeal all acts or parts of acts in conflict herewith, and to declare that an emergency exists."

The Railway Commission act is too voluminous to reproduce here, but it appears in full in the Compiled Statutes of Nebraska of 1907, as chapter 72, article 8. Its general purport is disclosed by the title quoted. Among the powers and duties conferred upon the Nebraska State Railway Commission the following are defined by the act (sec. 2.):

"(b) Said Commission shall have the power to regulate the rates and services of, and to exercise a general control over all Railroads, Express Companies, Car Companies, Sleeping Car Companies, Freight and Freight Line Companies, and all other Common Carriers engaged in the transportation of freight or passengers within the state.

"(c) Said Commission shall investigate any and all cases of alleged neglect or violations of the laws of the state by any Railway Company, or Common carrier subject to the provisions hereof, doing business in this state, or by the officers, agents or employees thereof, and take such action with reference thereto as may be provided herein, or under the laws of this state providing for the regulation of Railway Companies or Common Carriers." * * * (Compiled Statutes of Nebraska, chapter 72, article 8, sec. 2, b.)

"Said Commission may consult and advise with the attorney-general from time to time with reference to any or all matters upon which they may require advice, and it shall be the duty of the attorney-general to give such

advice as the Commission may require of him, and to perform such other services within the line of his duty as said Commission may require. (Compiled Statutes of Nebraska, chapter 72, article 8, sec. 21.)

"If any Railway Company or Common Carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers or employees, by any special rate, rebate, drawback, or other device, shall charge, demand, collect, or receive from any person, firm or corporation, a greater or less compensation for any service rendered, or to be rendered by it than it charges, demands, collects, or receives from any other person, firm or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful.

"(a) If any Railway Company or Common Carrier subject to the provisions of this act, through or by its officers, agents, or employees, makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or subjects any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever, the same shall constitute an unjust discrimination, which is hereby prohibited.

"(b) If any Railway Company or Common Carrier subject to the provisions of this act, through or by its officers, agents or employees, shall fail, refuse or neglect, under such regulations as may be prescribed by the commission, to receive and transport without delay or discrimination, the passengers, tonnage, and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the Commission, fail and refuse to transport and deliver without delay or discrimination, any passengers, tonnage, or cars, loaded or empty, destined to any point on or over the line of any connecting carrier, the same shall constitute an unjust discrimination which is hereby prohibited: Provided perishable freight of all kinds and live stock shall have precedence in shipment." (Compiled Statutes of Nebraska, chapter 72, article 8, sec. 14, a, b.)

That relief is sought on behalf of the State of Nebraska

to prevent injury to the public is shown by the following allegation of the petition filed in the state court:

"All of said unlawful acts and threatened acts are contrary to equity and good conscience and to the manifest injury of the plaintiffs in the premises and to the people of the state of Nebraska, that the wrongs and threatened acts of defendant are irreparable and plaintiffs are without adequate remedy except in a court of equity."

The supreme court of Nebraska is a court of limited original jurisdiction, being restricted in original controversies by section 2, article 6, of the Nebraska Constitution to cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto and habeas corpus.

June 22, 1907, the Chicago, Burlington & Quincy Railroad Company, defendant, removed the suit in equity from the supreme court of Nebraska to the Lincoln division of the United States circuit court for the district of Nebraska, on the ground of diverse citizenship.

July 12, 1907, the State of Nebraska filed, in the Lincoln division of the circuit court of the United States for the district of Nebraska, a motion to remand the case to the state supreme court on the ground that the federal court was without jurisdiction either over the parties or over the subject-matter involved therein. In support of the motion to remand it was urged that the State of Nebraska is the real party plaintiff in the state court and not a citizen within the removal acts of Congress, and that, therefore, the federal court acquired no jurisdiction.

The question presented by the motion to remand and by this application for mandamus is not whether the petition in equity in the Nebraska court states a cause of action or whether injunction should issue on the facts pleaded by the state, but whether the state has power to bring the suit and the supreme court of Nebraska has jurisdiction to entertain it.

For the purpose of this question, not only all facts pleaded in the petition in the state court, but all matters which properly might have been stated therein, including the allegations in this application for mandamus, may properly be considered. At the time of the removal the right of amendment of the petition in the state court existed by virtue of a Nebraska statute conaining the following provision:

"The plaintiff may amend his petitio.: without leave, at any time before the answer is filed, without prejudice to the proceeding." (Compiled Statutes of Nebraska for 1907, paragraph 6712.)

The motion to remand was overruled September 25, 1907, and the United States district judges assumed jurisdiction of the cause, and unless directed by this court to remand the case to the state court will compel the state of Nebraska to abandon its suit in its own name or proceed to trial on the merits in the circuit court of the United States, where, as insisted by petitioner, all further proceedings, orders and judgments will be without jurisdiction and void.

This is an original application to this court to compel defendants herein to remand to the supreme court of Nebraska the suit instituted therein by the State of Nebraska and subsequently removed to the circuit court of the United States for the district of Nebraska

## ARGUMENT.

### I.

### Where a circuit court of the United States has no jurisdiction over a cause removed by defendant from a state court and refuses to remand it upon a proper motion, mandamus is plaintiff's remedy.

THE State of Nebraska is a party plaintiff on the record of the case commenced in the supreme court of Nebraska, and it is urged that it is the real and necessary party plaintiff, and that, therefore, it is not a citizen within the removal acts of Congress.

If this position is correct, the circuit court of the United States acquired no jurisdiction by removal and its refusal to remand was without authority of law and mandamus requiring the United States district judges to remand the case to the state court is the remedy of the State of Nebraska. In the recent case of *Ex parte Wisner*, 203 U. S. 449, this court in awarding a writ of mandamus to compel a circuit court of the United States to remand to a state court a civil case not within the jurisdiction of the federal court, ruled:

"Our conclusion is that the case should have been remanded, and as the circuit court had no jurisdiction to proceed, that mandamus is the proper remedy.' (*Ex parte Wisner*, 203 U. S. 449.)

The present application is within the rule stated, and mandamus is the proper remedy, as an examination of the record will show that the circuit court of the United States was wholly without jurisdiction to proceed in the case removed from the supreme court of Nebraska, wherein the state of Nebraska and others were plaintiffs and the Chicago, Burlington & Quincy Railroad Company was defendant.

II.

**Under the constitution of the state of Nebraska, as interpreted by the supreme court thereof, the state of Nebraska may become a plaintiff and maintain in the supreme court of Nebraska a suit in equity to promote the general welfare by protecting the public from oppressions, extortions or other injuries, though the state of Nebraska has no pecuniary or property interest in the suit.**

The bringing of the suit instituted by the state of Nebraska in the supreme court of Nebraska was the exercise of a sovereign power described by Mr. Justice BREWER in the following language:

"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and *it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter.* The obligations which it is under to promote the interest of all, and *to prevent the wrong-doing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.*" (*In re Debs*, 158 U. S., 584.)

The jurisdiction of the supreme court of Nebraska to hear and determine the cause of the state of Nebraska against the Chicago, Burlington & Quincy Railroad Company is derived from the following section of the Nebraska Constitution:

"The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision. *It shall have original jurisdiction in cases relating to the revenue, civil cases in which the*

*state shall be a party*, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." (Constitution of Nebraska, art. 6, sec. 2.)

By construction of the supreme court of Nebraska the jurisdiction included in the words "civil cases in which the state shall be a party" is not limited to cases involving a monetary or pecuniary interest of the state, but extends to remedies on behalf of the public where no property interest of the state is involved. (*State v. Commercial State Bank*, 28 Neb., 682; *State v. Exchange Bank of Milligan*, 34 Neb., 200.) This interpretation of the Nebraska constitution by the highest court of the state is a part of the Nebraska constitution itself, and is binding on the federal courts, since it does not conflict with the constitution of the United States or with any act of congress or treaty. This doctrine has been stated by this court as follows:

"Where the question turns upon the construction to be given to the constitution of the state, and we find a construction made by the highest state court very soon after the constitution was formed, acquiesced in by the people of the state for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it, and apply it to this case, to which, in our judgment, it is justly applicable. Such has been the uniform course of this court. *McKeen v. Delancy's Lessee*, 5 Cranch, 22; *Polk's Lessee v. Wendall*, 9 Cranch, 87; *Gardner v. Collins*, 2 Pet., 58; *Shelly v. Gay*, 11 Wheat., 351; *Green v. Neal*, 6 Pet., 291, are some of the cases in which this course has been followed, and its reasons explained. The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the state, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they

see fit to change their constitution; and *this court receives such a settled construction as part of the fundamental law of the state.*" (*Sheppard v. Graves*, 14 Howard, 504.)

The constitution of the state of Nebraska confers upon its supreme court, therefore, jurisdiction of civil cases in which the state is a party. This jurisdiction extends to civil cases brought by the state in the interests of the public, though no monetary interest of the state is involved, and the federal courts are bound by the provisions of the Nebraska constitution thus interpreted.

The two Nebraska cases cited involved the appointment of receivers for insolvent state banks at the suit of the state in cases in which no monetary interest of the state was involved. It is true the attorney general was authorized by a Nebraska statute to bring such a suit, but an examination of these cases, in connection with the constitution, will show that the statute did not affect the jurisdiction conferred upon the supreme court by the organic law of Nebraska.

*State v. Commercial State Bank*, 28 Neb., 682, was an original application to the supreme court of Nebraska for the appointment of a receiver for an insolvent state bank, where the state had no monetary or pecuniary interest. The suit was instituted by the state in a governmental capacity "to protect those interested and to prevent a diversion of the funds from the purpose to which they should be applied." Jurisdiction of the supreme court was invoked under section 2, article 6 of the Nebraska constitution, which provides that the supreme court shall have original jurisdiction "in civil cases in which the state shall be a party." After quoting a portion of the banking act authorizing the appointment of a receiver the supreme court of Nebraska, in 1890, said:

"Section 2 of article 6 of the constitution confers original jurisdiction on the supreme court in *civil cases in which the state is a party.* The above quoted section of

the banking act provides that the application for the appointment of a receiver may be made to this court. We do not hesitate to entertain jurisdiction." (*State v. Commercial State Bank*, 28 Neb., 682.)

In a later case the question thus determined was reexamined and followed and the supreme court of Nebraska, among other things, said:

"It is contended by counsel that by the provision of the constitution under consideration, the *original jurisdiction of this court in civil cases is limited to those actions or proceedings in which the state has a monetary interest* and that it is accordingly beyond the power of the legislature to confer upon us authority to appoint receivers in cases like this, in which the business is conducted by private parties. In *State v. Commercial Bank*, 28 Neb. 677, it was held that the application for a receiver in the name of the state is a civil case to which the state is a party within the meaning of the constitution, hence was within the jurisdiction of this court. * * *

"The construction suggested by counsel seems to us to be narrow and artificial. The power of the legislature to prescribe the terms and conditions upon which a corporation or an individual may transact a banking business within this state will not be seriously controverted. The purpose of the act, viz., to protect depositors and insure solvent banking institutions, is not only within the constitutional powers of the legislature, but is certainly a judicious exercise of such power. The legislature has by this act not only prescribed the conditions upon which any corporation, firm, or individual may engage in the business of banking, but has provided that in case of a violation of its provisions by a failure to comply with the conditions or terms imposed, *the state may interfere by means of the agencies provided by law in order to protect those interested and to prevent a diversion of the funds from the purpose to which they should be applied.* Whether the application for a receiver to impound the funds of an insolvent bank, is addressed to this court or the district court the effect is the same. *It is an exercise of the sovereign power of the state for a purpose and in*

*a manner plainly provided by law.* It is suggested by counsel that the statute does not provide that the proceedings shall be in the name of the state. True, it is not in express terms provided that the state of Nebraska shall be the plaintiff, or that the application shall be on the relation of the state. The omission, however, is in our judgment unimportant. *Whatever may be the form of the proceedings or title adopted, it is the action of the state.* The attorney general in making the application is obeying an imperative command of the statute. He is manifestly the representative of the state as effectually for all purposes as in a civil action to recover money due the state. * * * We think that *an application by the attorney general for the appointment of a receiver of an insolvent bank is a civil case and that the state is a party thereto within the meaning of the constitution.*" (*State v. Exchange Bank of Milligan*, 34 Neb., 200.)

Since 1875, therefore, when the present constitution of Nebraska was adopted, the supreme court of Nebraska has had jurisdiction of civil actions in which the state is a party, and for more than seventeen years this jurisdiction has been held by the highest state court to include cases brought by the state in a governmental or sovereign capacity for the protection and welfare of its citizens, though the state had no pecuniary or monetary interest in the litigation. It has already been shown that this construction of the constitution, giving the supreme court of Nebraska original jurisdiction over cases prosecuted by the state in its sovereign capacity for the protection and benefit of the public, though no pecuniary interest of the state is involved, is a part of the constitution itself, and that the Nebraska constitution thus construed by the highest court in the state is binding on the federal courts. (*Sheppard v. Graves*, 14 How., 504.)

The argument that the Nebraska constitution as construed by the supreme court of Nebraska confers jurisdiction on the supreme court in original cases where the state is a party, regardless of the question of pecuniary

interest, cannot be answered by asserting that the authority to appoint receivers in the cases of *State v. Commercial State Bank*, 28 Neb., 682, and *State v. Exchange Bank of Milligan*, 34 Neb., 200, was conferred by a state statute. The original jurisdiction of the Nebraska supreme court comes from the Nebraska constitution itself and can neither be enlarged nor diminished by the legislature. In discussing the jurisdiction of the Nebraska supreme court arising under section 2, article 6 of the Nebraska constitution, the state supreme court said:

"This court, except in the exercise of its appellate jurisdiction, is one of limited and enumerated powers. It shall have jurisdiction, says the constitution, 'in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law.' (Constitution, art. 6, sec. 2.) That provision, it was held in *Miller v. Wheeler*, 33 Neb., 765, is a grant of power and by implication limits the original jurisdiction of this court to the subjects therein enumerated." (*State v. Hait*, 47 Neb., 582.)

The original jurisdiction of the supreme court being thus established and limited by the constitution can be exercised without further legislation, and it was so held by the Nebraska supreme court in the case of *State v. Moores*, 56 Neb., 13, where the following language was used:

"Where the constitution in direct terms devolves upon this court a duty to be performed, the mere omission of the legislature to point out the method of performance will not prevent the performance of such duty in such manner as this court, with due deference to constitutional provisions, shall find itself bound to adopt."

These adjudications and the Nebraska constitution itself show that the original jurisdiction of the supreme court in cases in which the state is a party, regardless of the

question of pecuniary interest, is conferred by the organic law of the state, can be exercised without further legislation, and can neither be enlarged nor restricted by any act of the legislature. These being rules of law established by the supreme court of Nebraska in construing the Nebraska constitution and in defining its own jurisdiction and power, are binding upon the federal courts. (*Shepard v. Graves*, 14 How. 504; *Olson v. Smith*, 25 Sup. Ct. Rep. (U. S.) 52; *Knights Templars v. Jarman*, 187 U. S., 197; *Santa Cruz Co. v. Santa Cruz R. Co.*, 111 U. S., 362; *Glenn v. Garth*, 147 U. S., 369.)

The provision of the Nebraska constitution conferring upon the supreme court original jurisdiction in cases in which the state is a party, and the adjudications of the Nebraska supreme court that this jurisdiction includes civil cases brought by the state in its sovereign capacity for the protection and welfare of its citizens, though the state has no pecuniary interest in the litigation, were utterly ignored by the circuit court in refusing to remand to the supreme court of Nebraska the case brought therein by the state of Nebraska against the Chicago, Burlington & Quincy Railroad Company. This is manifest from the following language of the opinion of the circuit court, as it appears in the petition herein:

"The complainants' bill does not allege that any pecuniary interest of the state is affected. In the arguments of complainants the only interest of the state claimed to be involved is its governmental interest in the welfare of its citizens, and it is declared that a state has the right to enjoin a violation of the law. * * * In this case there is no property right of the state involved, nor is this suit brought in aid of police power nor as a direct prosecution or suit for penalties, and the state as an artificial person has no real interest in the action."

As already shown the matters thus stated were entirely outside the jurisdiction of the circuit court of the United States. The power of the state to sue had been previ-

ously asserted in the organic law of Nebraska and the jurisdiction of the supreme court thereunder had been adjudicated by that tribunal without interfering with any provision of the constitution of the United States, federal statute or treaty and the federal court was precluded from ruling otherwise. By refusing to remand the case the federal court deprived the supreme court of Nebraska of its right at the suit of the state to pass on its own jurisdiction and of its right under the constitution of Nebraska at the suit of the state to grant or refuse an injunction to prevent the Chicago, Burlington & Quincy Railroad Company from injuring the people of Nebraska by disobeying its laws and by defying its officers in the lawful discharge of their duties.

In overruling the motion to remand, in holding that the state is not the real party in interest, in deciding that the state must keep out of its own courts of equity, except when its pecuniary interests are involved, and in assuming to exercise jurisdiction in the case removed from the state court, the circuit court of the United States has not only usurped and attempted to exercise a power having no lawful existence, but has departed from a well established rule of this court. The report of *In re Debs*, 158 U. S., 564, shows that the circuit court of the United States for the northern district of Illinois granted an injunction to prevent Debs and other conspirators from forcibly obstructing interstate transportation and from interfering with the carriage of the United States mails. Debs violated the injunction, was imprisoned for contempt, and petitioned this court to be discharged on habeas corpus. The record presented two questions:

"1. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof?

"2. If authority exists, as authority in governmental

affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?"

It was argued by the petitioner that the government could not interfere by injunction to prevent the conspirators from obstructing interstate commerce and the United States mails, since no property right or pecuniary interest of the United States was involved in the suit for an injunction. The court justified the injunction, however, on the ground that the government had a property interest in the mails, but refused to base the decision on that ground alone, holding that the obligation of the government to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give the sovereign a standing in a court of equity. After showing that the property interest of the government in the mails was sufficient to justify the injunction, this court by Mr. Justice BREWER said:

"We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and *it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter.* The obligations which it is under to promote the interest of all, and *to prevent the wrongdoing of one resulting in injury to the general welfare*, is often of itself sufficient to give it a standing in court." (*In re Debs*, 158 U. S., 584.)

That the *interest* which will justify the sovereign in redressing public wrongs in its own courts is not limited to a *pecuniary interest*, or confined to civil remedies, is shown by the ruling of this court in the recent case of *Burton v. United States*, 202 U. S., 344. The report of that

case shows that Senator Burton was indicted for violating a federal statute which forbids a senator to "receive or agree to receive any compensation whatever, directly or indirectly, for any service rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a *party, or directly or indirectly interested*, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever." (Rev. Stat. sec. 1782.) For compensation Senator Burton in violation of the statute appeared before the Post Office Department for the Rialto Grain and Securities Company and attempted to prevent an order depriving it of the use of the mails in promoting a fraudulent scheme. In defense he insisted that "interest" as used in the statute meant pecuniary interest and that the United States was neither a party to nor interested in the proceeding before the Post Office Department, and that, therefore, no offense was committed. In reviewing the conviction this court held that the United States was both a party and interested and, by Mr. Justice HARLAN, said:

"It is next contended that the indictment does not present the case of a proceeding, matter or thing in which, within the meaning of the statute, the United States was a party or interested, nor adequately state the facts constituting the offense. These objections are, we think, without merit. Our reading of the statute and the indictment leads to the opposite conclusion.

"The statute makes it an offense for a senator, after his election, and during his continuance in office, to receive or agree to receive compensation, in any form, from any person, in relation to a proceeding, matter or thing before a department in which the United States is a party, or directly or indirectly interested. The scope of the statute is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative in-

tent. The business in respect of which the accused is charged to have both agreed to receive, and to have received, compensation, was plainly a proceeding or matter in which the United States was interested. That such proceeding or matter involved the pecuniary interests of the defendant's client is not denied. That it also involved the use of the property as well as postal facilities furnished by the United States for carrying and transporting mail matter must also be admitted. What the postoffice department aimed to do in the execution of the acts of congress and the regulations established under those acts was to protect the mails of the United States from being used, in violation of law, to promote schemes for obtaining money and property by means of false and fraudulent pretenses, representations and promises. That statute has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the constitution. *Ex parte Jackson*, 96 U. S. 727, 732; *In re Rapier*, 143 U. S., 110; *School of Magnetic Healing v. McAnnulty*, 187 U. S., 94; *Public Clearing House v. Coyne*, 194 U. S., 497, 508. In the proceeding, matter and thing before the department, with which the defendant was connected as an attorney for a corporation immediately concerned in the result, the postmaster general represented the United States, and, in the discharge of his official duties, sought to enforce a law of the United States. *The United States was the real party in interest on one side*, while the Rialto Company was the real party in interest on the other side. If the postmaster general did not represent the United States, whom did he represent? The word "interested" has different meanings, as can be readily ascertained by examining books and the adjudged cases. 4 Words and Phrases Judicially Defined, 3692; Stroud's Judicial Dictionary, 399. But its meaning here is to be ascertained by considering the subject matter of the statute in which the word appears. And it is, we think, a mistake to say that the United States was not interested, directly or indirectly, in protecting its property, that is, its mails and postal facilities, against improper and illegal use, and in the enforcement, through

the agency of one of its departments, of a statute regulating such use. It would give too narrow an interpretation to the statute to hold that the United States was not interested, directly or indirectly, in a proceeding in the department having such objects in view. It is true the business before the postoffice department in which the Rialto Company was concerned did not assume the form of a suit in which there were parties according to the technical rules of pleading. But it was, nevertheless, in a substantial sense, a proceeding, matter or thing before an executive department in which the United States and the Rialto Company were interested.

"It is said that, within the meaning of the statute, the United States is not interested in any proceeding or matter pending before an executive department, unless it has a direct moneyed or pecuniary interest in the result. Under this view, senators, representatives and delegates in congress, who are members of the bar, may regularly practice their profession for compensation before the executive departments in proceedings, which if not directly involving the pecuniary interests of the United States, yet involve substantial pecuniary interests for their clients as well as the enforcement of the laws of the United States enacted for the protection of the rights of the public. Such a view rests upon an interpretation of the statute which is wholly inadmissible. In our opinion, section 1782 excludes the possibility of such a condition of things, and makes it illegal for senators, representatives or delegates to receive or agree to receive compensation for such services." (*Burton v. United States*, 202 U. S., 370.)

The philosophy of injunction as a public remedy is not to be found in the peculiarity or enormity of any particular evil or wrong, but in the power and duty of the state to provide adequate relief on behalf of the injured public against the abuse of corporate power, the violence or plunder of conspirators, and the wrongs of individuals. In discovering remedies to prevent public injury the courts ought to keep pace with evil genius and modern combination in inventing devices to evade and cheat the law. It cannot be that the decadence of equity has reached the

point where the courts classify the kinds of public wrongs which can be prevented by injunction and exclude all others, while the new contrivances for public extortion and spoliation are constantly multiplied. Public protection by means of injunction has already been applied to a variety of cases and has been recognized for many years by both English and American courts, as an examination of the adjudications will show.

*Attorney General v. Great Northern R. Co.*, 1 Drewry & Smale, 154, was an injunction suit elaborately argued and seriously considered in the high court of chancery of England. The purpose of the action was to enjoin defendant from committing unlawful acts resulting in injury to the public. Defendant in the case last cited was incorporated under an act of parliament which authorized it to operate a railway system between the north of England and London. The corporation constructed its road and engaged in the business of carrying passengers. It also carried coals for merchants and others. Afterward the corporation went outside of its legitimate business of carrier and engaged in buying coal lands and in buying and selling coals in competition with merchants for whom it acted as a common carrier. There was an attempt on the part of defendant, by certain contrivances, to conceal its unlawful operations in the coal business. In commenting on the facts the Vice-Chancellor said:

"With regard to the question of fact, that the Great Northern Railway Company have for a long period been dealers in coal, I can entertain no doubt. It appears that from the year 1852 this practice has been continued. They have been buying very large quantities of coal, and some portion was no doubt necessary for the working of their railway, but that portion was comparatively small. By far the largest portion of it was purchased for the express purpose of being sold, and was, in fact, sold; and the proceeds have gone into the coffers of the company. By a crafty contrivance the company have kept the fact con-

cealed until a very recent period. The company induced coal owners to appoint as their nominal agent a person whom the company nominated, so as to make it appear that such person was selling the coal as the agent of the coal owners, and not as the agent of the railway company. But the contract between the railway company and the coal owners was this, that the company paid the coal owners so much per ton (say 13s.), and the coal vendors from the time the coal was delivered to their nominal agent, who was, in fact, the agent of the company alone, had nothing more to do with it. It belonged to the company, was brought by them to London, and the proceeds of the sale were carried to the railway traffic account. This crafty contrivance has now been discovered; and it is clear from the evidence that the company have for a long time been buying and selling coal for profit." (*Attorney General v. Great Northern R. Co.*, 1 Drewry & Smale, 158.)

In discussing the right of the public to relief in chancery, on the facts stated, the Vice-Chancellor, after showing that the carrier's conduct was fraught with injury to the public, said:

"The only remaining question is this: whether, if the interests of the public are injured or endangered by the practice complained of, it is competent for the attorney general, *ex officio* or on relation, to file an information to prevent it.

"On this point I entertain no doubt whatever. *Wherever the interests of the public are damnified by a company established for any particular purpose by act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the attorney general to protect the interests of the public by an information; and that where, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction. The cases in which the*

*attorney general comes forward on behalf of the public, to ask this court to restrain a nuisance, are an illustration of this principle.* A nuisance may be detrimental to the public or to an individual; and it is very usual for the attorney general to come forward for an injunction to restrain it, so far as it affects the public, just as an individual may apply for an injunction to restrain it where it affects himself. It is true that every injury is not a nuisance; but *the right of the public to be protected against injury by the information of the attorney general is not confined to those injuries which come within the strict definition of a nuisance. Where it is the interest of the public to prevent an illegal act such as this being committed, it is competent for the attorney general to file an information to restrain it.*

"It has however been contended that as the act of the 7 & 8 Vict. c. 85, ss. 16, 17, prescribes a particular remedy in such a case, the attorney general cannot take proceedings otherwise than in accordance with the terms of that provision.

"This objection in truth involves the contention that this court has no jurisdiction to entertain the suit by the attorney general unless it is instituted under the circumstances mentioned in those sections.

"The effect of those sections is not to take away either the right of the attorney general to file such an information at his discretion, although there is no certificate of the board of trade, or the jurisdiction of the court to entertain such a suit. * * *

"I consider, therefore, the court has jurisdiction to grant the injunction on the information." (*Attorney General v. Great Northern R. Co.*, 1 Drewry & Smale, 163.)

The last case cited cannot be dismissed as inapplicable to the question presented to the supreme court of Nebraska by the suit of the state against Chicago, Burlington & Quincy Railroad Company. It cannot be brushed aside as a precedent on the motion to remand by the mere statement that equitable jurisdiction in the English case arose from the fact that the corporation went outside of its delegated powers. The defendant in the state court also

went outside of its delegated powers and attempted to exercise authority not committed to it by its charter when it exacted for services extortionate charges in excess of the rates fixed by law. It also went outside of its delegated powers when it defied state officers in the lawful discharge of their duties. An examination of the English case and the oft-repeated assertion of the chancellor in his opinion that it was his duty to protect the public against injury show that relief was granted on that ground and not because the corporation had exceeded its delegated powers. The supreme court of Nebraska has the same power as the English courts of chancery, having derived it from section 1, chapter 15*a*, Compiled Statutes of Nebraska, which provides:

"So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory."

In giving effect to this statute the supreme court of Nebraska has held that the common law jurisdiction of the English courts of chancery has been transplanted into the Nebraska courts possessing common law and equity powers. (*St. James Orphan Asylum v. Shelby*, 60 Neb., 803.)

The supreme court of Nebraska, therefore, at the suit of the state, has ample power by means of injunction to protect the public from the aggressions of a common carrier in exacting excessive and unlawful rates, and this is true though the state has no pecuniary interest in the litigation and the offenses committed are punishable in the criminal courts of the state.

In a case of this character it is immaterial whether the cause is brought in the name of the state or by the attorney general or some other officer or by all combined. In any form the power of the sovereign is asserted and the

real and only party is the state. Officers have only the power derived from statute, but there is a power inherent in sovereignty not depending upon statutory or constitutional provisions, which authorizes the state to ask the aid of courts of equity to prevent injury to the public. Officers, therefore, can only exercise such authority in so far as they truly represent the sovereign. The real party is the government, no matter in whose name suit is brought. The rule that the state may seek equitable relief for the protection of the public without the aid of legislation was correctly stated by the supreme court of Texas in the following language:

"The right of the state, to appear, by her proper law officer, in her own courts, and prosecute suits in her own behalf, is an incident of her sovereignty, not dependent upon any statute; and to be exercised whenever her laws are infracted or her rights invaded." (*State v. Delesdernier*, 7 Tex. 76.)

Neither the attorney general nor any other officer is authorized by statute or otherwise to exercise in his own name or officially the sovereignty of the state. That power belongs to the state itself and the most any officer can do is to truly represent the state. In the state court the officers joined as plaintiffs are mere nominal parties and the state is the only real party.

The doctrine announced in the English chancery case of *Attorney General v. Great Northern R. Co.*, 1 Drewry & Smale, 154, already cited, has been adopted and followed by American courts in the following cases: *Stockton, Attorney General, v. Central R. Co.*, 50 N. J. Eq. 80; *Trust Co. v. Georgia*, 109 Ga. 748; *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 363; *Louisville & Nashville R. Co. v. Commonwealth*, 97 Ky. 695; *Attorney General v. Railway Companies*, 35 Wis. 529; *In re Debs*, 158 U. S. 584.

*Attorney General v. Jamaica Pond Aqueduct Co.*, 133

Mass. 363, was a suit on behalf of the state to prevent the Jamaica Pond Aqueduct Company from lowering the water in Jamaica Pond below the limit fixed in its charter. The effect of the acts against which injunction was sought was to impair the rights of the public in the use of the pond for fishing, boating, and other lawful purposes The injunction was granted, the court, among other things, saying:

"The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation, exercising the right of eminent domain under a power delegated to it by the legislature, from any abuse or perversion of the powers, which may create a public nuisance *or injuriously affect or endanger the public interests.*"

*Trust Company v. Georgia*, 109 Ga. 751, was an action brought in the name of the state to restrain defendant from taking over to itself certain competing street railway companies. It was prosecuted on the theory that the provision of the constitution had been violated, which prohibited monopolies from controlling traffic. The allegation of the bill was to the effect that by the action of the Trust Company competition in street car traffic would be destroyed and a monopoly created, from which injury to the public would result. The Georgia statutes nowhere gave a court of equity power or jurisdiction to restrain violations of the act. After an elaborate discussion in which reference was made to both English and American cases, the supreme court of Georgia upheld the doctrine that the state had the right to a remedy in equity against the commission of acts injurious to the public, though no property rights or pecuniary interests of the state were involved. The court said:

"Our conclusion, therefore, both from reason and a decided weight of authority, is that the state, in her sovereign capacity, can appeal to the courts for relief by

injunction whenever either its property is involved, or *public interests are threatened and jeopardized by any corporation.*" (*Trust Company v. Georgia*, 109 Ga. 751.)

The report of the case of *Attorney General v. Railroad Companies*, 35 Wis. 550, shows that the legislature of Wisconsin enacted a law fixing maximum rates for the transportation of passengers and freight over railroads. The law declared violations of the act to be misdemeanors, and provision was made for the punishment of those found guilty of violating it. The law contained no provision authorizing courts of equity to enforce its provisions. There was no other statute or constitutional provision in Wisconsin conferring upon the courts of equity jurisdiction to require obedience to the enactments of its legislature. Certain railroads of the state violated the law by charging excessive rates. Quo warranto was brought against them to forfeit their franchises for such violation. During the pendency of the quo warranto the attorney general filed a petition in equity for an injunction to restrain the offending carriers from violating the provisions of the statute. The petition failed to show that any pecuniary interest of the state was involved, but alleged injury to the general public. A penal statute in that case was being violated to the injury of the public. The state was attempting to restrain a continuation of the injury, just as in the supreme court of Nebraska the state undertook to restrain the continuation of wrongs which injure the public. On the facts stated in the Wisconsin case the supreme court of that state held that the common law gave a court of equity, independently of statute, jurisdiction and power to protect the public from further injury. On points presented the Wisconsin court among other things said:

"We have been unable to find any English statute enlarging the jurisdiction of the court of chancery in such

cases; and we find all the English cases proceeding without reference to statutory jurisdiction. We find no room for doubt that this jurisdiction of English courts of equity is independent of all authority by statute, and has long been as well recognized as any ground of equitable jurisdiction whatever. And these views are fully sustained by the case just quoted.

"We cannot state the rule better than by taking it from the excellent work of Mr. Brice, so recently given to the profession:

"'Under many circumstances the court of chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the attorney general. No single person, whether a member of the corporation in question or not, is able on his own account and of his own motion to call upon the court to interfere for his special protection. The wrong he complains of is not confined to himself; no right or privilege peculiar to himself is violated. The wrongs inflicted and the rights invaded affect the public, and the public, consequently, must be a party to the proceedings. The occasions upon which the court will exercise jurisdiction to restrain the doing of acts of this kind seem to fall into the three following heads:' The author then proceeds to give the three heads of jurisdiction at large, which are thus classed in his own words: '1st, when a corporation is abusing powers given for public purposes; 2d, or is committing a breach of trust; 3d, or is acting adversely to public policy.' We copy this last in full:

"'When any corporation is doing acts detrimental to the public welfare, or hostile to public policy. The right of the attorney general to interfere on these grounds was fully established in *Attorney General v. Great Northern Railway Company*, where the defendants had engaged in an illegal trade in coals. It was objected that it was not competent for him to file an information. But Kindersley, V. C., said: "On this point I entertain no doubt whatever. Whenever the interests of the public are damnified by a company established for any particular purpose by

act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the attorney general to protect the interests of the public by an information; and that, when in the case of an injury to private interests it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general in cases of injury to public interests from such a cause to file an information for an injunction."

"The writer then proceeds: 'The above being the grounds of the jurisdiction of the court of chancery in this behalf, the next point is, when can the attorney general direct proceedings on behalf of the public? He may do so whenever public interests have been damnified, or will manifestly be damnified, in the result, by transactions which are now taking place. And it would seem from the judgment in *Ware v. Regent's Canal Company* (3 De Gex & J., 212, 228), that he may do so when a corporation is going beyond its special powers, even though no definite injury has been done or is likely to be done to the public. Where there has been an excess of the powers given by an act of parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the attorney general, on behalf of the public, has a right to apply to this court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature.' Brice's *Ultra Vires*, 506-9.

"The custom of courts of equity to interfere in such cases at the suit of private parties for private injuries, is quite old. It seems to have grown up out of the ancient jurisdiction to restrain waste and nuisance. We shall not attempt to trace it. It is recognized as an established jurisdiction by Lord Hardwicke in 1752 (*Fishmongers' Co. v. East India Co.*, 1 Dickens, 163); and particularly as applied to corporations exceeding or abusing their franchises, by Lord Eldon in 1815, *Agar v. Regent's Canal Co.*, Cooper, 77. In more recent times, as corporations have grown in number and power, cases applying this jurisdiction to them are very numerous. We cite a few at random: *River Dun N. Co. v. North Mid. Railway Company*, 1 Eng-

lish Railway Cases, 135; *Blackmore v. Glamorgan Canal Navigation*, 1 Mylne & K., 154; *Coats v. Clarence Railway Company*, 1 Russell & M. 181; *Dawson v. Paver*, 5 Hare, 415; *Broadbent v. Imperial Gas Company*, 7 De Gex., M. & G., 437; *Ware v. Regent's Canal Company*, 3 De Gex & J. 212; *London & Brighton Railway Company v. Cooper*, 2 English Railway Cases, 312.

"The general grounds of jurisdiction, in favor of private persons as well as the public, are stated by Lord Eldon in *Blackmore v. Glamorgan Canal Navigation*. 'When I look upon these acts of parliament I regard them all in the light of contracts made by the legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their number and operation, they affect so many individuals that I apprehend those who come for them to parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else; that they shall do and forbear all that they are required to do and forbear, as well with reference to the interests of the public as with reference to the interests of individuals. It is upon this ground that applications are frequently made,' etc.

"And the jurisdiction is now clearly defined as having two branches; one on behalf of the state, for public wrong, and the other on behalf of private persons, for private wrong, arising from an excess or abuse of corporate franchise. Relief against public wrong is confined to informations by the attorney general. * * *

"Be that as it may, the authority of the English chancery to restrain corporate violations injuring or tending to injure public welfare, or to defeat public policy, at the suit of the attorney general, as stated by Mr. Brice, is now beyond controversy. *Attorney General v. Johnson*, 2 Wilson, 87; *Attorney General v. Forbes*, 2 Mylne & C. 123; *Attorney General v. Eastern Counties Railway Company*, 3 English Railway Cases, 337; *Attorney General v. Great*

*Northern Railway Company*, 4 De Gex & S. 75; *Attorney General v. Sheffield Gas Company*, 3 De Gex, M. & G. 304; *Attorney General v. Great Northern Railway Company*, 1 Drewry & S. 154; *Attorney General v. Mid-Kent Railway Co.*, 3 Chancery Appeal Cases, 100; *Attorney General v. Cambridge Gas Co.*, 4 Chancery Appeal Cases, 71.

"The grounds on which this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import. The modern exercise of this jurisdiction has kept pace with the multiplication of great corporations in England. The cause may be found in the language of Lord Eldon already quoted, and the motive in the language of Lord Cottenham three times repeated: 'I have before taken occasion to observe that I thought it the duty of this court to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise; and not, from too strict adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.' 1 Mylne & C. 559; 4 id. 141, 635.

"In our day the common law has encountered in England, as in this country, a new power unknown to its founders, practically too strong for its ordinary private remedies. The growth of great corporations, centers of vast wealth and power, new and potent elements of social influence, overrunning the country with their works and their traffic throughout all England, has been marvelous during the last half century. It is very certain that the country has gained largely by them in commerce and development. But such aggregations of capital and power outside of public control are dangerous to public and private right, and are practically above many public restraints of the common law, and all ordinary remedies of the common law for private wrongs. Their influence is so large, their capacity of resistance so formidable, their powers of oppression so various, that few private persons could litigate with them; still fewer private persons would

litigate with them, for the little rights or the little wrongs which go so far to make up the measure of average prosperity of life. It would have been a mockery of justice to have left corporations, counting their capital by millions—their lines of railroad by hundreds, and even, sometimes, by thousands of miles—their servants by multitudes—their customers by the active members of society—subject only to the common law liabilities and remedies which were adequate protection against turnpike and bridge and ferry companies, in one view of their relations to the public; and, in another view, to the same liabilities and remedies which were found sufficient for common carriers who carried passengers by a daily line of stages and goods by a weekly wagon, or both by a few coasting or inland craft; with capital and influence often less than those of a prosperous village shopkeeper. The common law remedies, sufficient against these, were, in a great degree, impotent against the great railway companies—always too powerful for private right, often too powerful for their own good. It was in these circumstances that the English courts of equity applied their restraining jurisdiction at public or private suit, and laid on these great companies the strong hand of equitable control. And all England had occasion to bless the courage and integrity of her great judges, who used so ably and freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. Every person suffering or about to suffer their oppression, by a disregard of corporate duty, may have his injunction. When their oppression becomes public, it is the duty of the attorney general to apply for the writ on behalf of the public. And in this country, where the judicial tone is less certain, it is refreshing to read the bold and true words of which English equity judges do not spare the utterance. One of these corporations having violated an injunction, V. C. Shadwell says: 'Considering then their conduct to be at once contumacious and otherwise illegal, to be wrongful against the plaintiff individually, wrongful against the Queen's subjects at large, and of, I had almost said, scandalous example; whatever amount of inconvenience may be the consequence of acting against the defendants on this occasion, I think it right to deal with them according to their merits. The consequence

may possibly be to stop the railway. I answer again that it ought to be stopped, for it passes where it does by wrong. The directors of the company and their agents cannot, on this motion, at present, be committed to prison; but what can be, shall be done, to repress a daring invasion of public and private rights, maintained in open defiance of law, authority and order. Let a sequestration issue.' *Att'y Gen. v. Great North. Railway Co.*, 4 De Gex & S. 93. A great example of authority, in proper cases, for all American judges." (*Attorney General v. Railroad Companies*, 35 Wis. 532.)

According to the holding of the supreme court of Wisconsin in the case last cited the state of Nebraska is the only real party plaintiff in the state court and injunction may be allowed to prevent defendant from oppressing the people with unlawful rates.

The supreme court of Kentucky, in a recent case, cited with approval the case of *Attorney General v. Railroad Companies*, 35 Wis. 532, in *Louisville & Nashville R. Co. v. Commonwealth*, 97 Ky. 695.

The latter case was an application by the state to prevent a railroad company from absorbing the entire system of parallel and competing lines of railway, and to prevent the creation of a monopoly of railroad transportation, the court saying:

"It is contended injunction is not the proper remedy; but it seems to us if the commonwealth of Kentucky can sue at all for an act of *ultra vires* by a corporation, there is no room for disputing its right to a preventive injunction in this case. For, according to very respectable authority, and, we think, upon principle, a court of equity has jurisdiction, and may, in an action by the state, enjoin a corporation from exceeding its chartered powers *or doing acts otherwise illegal and injurious to the public.* (Pomeroy's Equity Jurisprudence, sec. 1093; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 564; *Langdon v. Branch*, 37 Fed. R. 449; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52;

*Attorney General v. Railroad Co.*, 35 Wis. 524.)" (*Louisville & Nashville R. Co. v. Commonwealth*, 97 Ky. 695.)

The judgment in this Kentucky case was afterward affirmed by the supreme court of the United States. (*Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677.)

See also *Stockton v. Central R. Co.*, 50 N. J. Eq. 52.

The chancery powers of this court were invoked to cancel a patent of the Bell Telephone Company. The patent was procured by fraud, and it was urged as a defense to the suit in equity that the government had no pecuniary interest in the matter, and that therefore it had no right to maintain a suit in equity. The court exercised equity jurisdiction at the suit of the United States on the following ground:

"The essence of the right of the United States to interfere in the present case is its *obligation to protect the public from the monopoly of the patent which was procured by fraud.*" (*United States v. Bell Telephone Co.*, 128 U. S. 367.)

In all these cases the obligation of the state to prevent injury to the public is made prominent by the courts. The foundation of equity jurisdiction in the cases cited rests on the oft-repeated obligation of the state to protect the public from injury. This is the obligation of the state and the state is the real party.

The power and duty of the state to become a plaintiff in a suit to enjoin defendant from injuring the public with unlawful and excessive rates is not defeated because the statutes violated by defendant impose penalties for disobedience thereof. Individuals may be punished criminally, but the public can only receive the full measure of relief by enforcement of the rates established by law.

*Attorney General v. Brown*, 1 Wilson's Chancery Reports, 323, was a suit in the high court of chancery, to

enjoin defendants from imposing duties or assessments on certain articles landed on the beach at Brighton. Defendants resisted the suit on the ground that injunction could not be granted to prevent the commission of a crime. On this question the Lord Chancellor said:

"Supposing the defendants can establish the proposition that this is a criminal act, yet if it be a breach of a public trust, the *cestui que* trusts have a right to a declaration by this court that the acts complained of ought not to have been done, and that they ought not to be repeated. The proposition contended for would go to a great and alarming extent. It would extend to all conspiracies and confederacies to obtain deeds and wills from persons incapacitated by imbecility of mind from executing such instruments; for these would be criminal acts. But is a court of equity on that account to be deprived of its jurisdiction? The only reason for the non-interference of a court of equity in matters of felony is because, generally speaking, they involve transactions out of which no civil rights arise; but if civil rights do arise out of a criminal transaction, the criminal nature of the subject is no objection to the interference of a court of equity. The prayer that the commissioners may be restrained from levying and the treasurer and collector from receiving the rates which shall not have been made for the purposes of the act, is not a prayer that they may be restrained from committing a crime, but from doing that which would be injurious to civil interests. A party may have a civil remedy for an act which amounts to a misdemeanor; as in the case of an assault, which, though punishable criminally, may also be made the subject of an action. Courts of equity in cases of fraud, have considered themselves bound to decree relief, where more than one of the parties might have been punished at common law. A suit may be instituted in this court for restraining a nuisance, which is a criminal act. In *Baines v. Baker* and *The Attorney General v. Cleaver*, the principle was admitted, though the court did not interfere under the particular circumstances. This is a sufficient answer to the objection made by the defendants that this court will not restrain a party from committing a criminal act. (*Attorney General v. Brown*, 1 Wilson's Chancery Reports, 348.)

The doctrine thus announced is the rule of this court. Acts punishable as crimes may be enjoined at the suit of the state for the public good, and it was so held in an elaborate opinion by Mr. Justice BREWER in the case of *In re Debs*, 158 U. S., 564.

By the state constitution, by statute, by adjudicated cases, and by reason the state of Nebraska is the real plaintiff in the state court, the state has power to bring the suit and the supreme court has original jurisdiction to entertain it. There is, therefore, no power in the circuit court of the United States to assume jurisdiction by removal or otherwise.

The petition filed in the supreme court of Nebraska is sufficient under the Nebraska practice to present the questions argued, but if it were lacking in any particular the right to amend is granted by statute. Grounds of removal, if they exist, must be found alone in the petition filed in the state court. (*Minnesota v. Northern Securities Co.*, 194 U. S., 64; *Postal Telegraph Cable Co. v. Alabama*, 155 U. S., 487; *Tennessee v. Bank of Commerce*, 152 U. S., 454.)

The state's petition sets out or describes the statutes violated by the Chicago, Burlington & Quincy Railroad Company. They are pleaded as valid acts, and it is alleged that it is the duty of defendant to obey them. It is presumed they are valid and that the attorney general and railway commissioners performed their duty in attempting to enforce them. After describing the statutes and alleging that defendant violated them the petition states:

"All of said unlawful acts and threatened acts are contrary to equity and good conscience and to the manifest injury of the plaintiffs in the premises and to the people of the state of Nebraska, that the wrongs and threatened acts of defendant are irreparable and plaintiffs are without adequate remedy except in a court of equity."

This allegation in connection with the prayer and other

parts of the petition shows that relief is sought on behalf of the state for injuries to the public. This relief can only be granted to the sovereign and the state only can be the real party plaintiff, no matter in whose name or in what form the suit is brought.

This is not the case of trespassers under color of office seeking to enforce a void law in defiance of the constitution of the United States. On the face of the petition, which is the sole test of federal jurisdiction by removal, the officers truly represent the state in performing a lawful duty to compel obedience to valid statutes.

For the purpose of the motion to remand the question is not whether the supreme court of Nebraska ought, on the facts pleaded in the petition in the state court, to grant an injunction, but whether a civil suit to which the state is a real party plaintiff within the meaning of the Nebraska constitution has been brought in the supreme court of Nebraska. It is earnestly insisted that a correct determination of this question must result in a different conclusion from that reached by the United States district judges for the district of Nebraska, and that their holding is not justified by the cases cited in their opinion.

In holding that the state is not a party because it has no pecuniary or property interest involved in the suit, the chief reliance of the United States district judges seems to be the case of *Missouri, K. & T. R. Co. v. Missouri Railway and Warehouse Commissioners*, 183 U. S., 53. It is respectfully urged that for many reasons the doctrine announced in the *Missouri Case* has no application to the questions presented by this petition or by the state's motion to remand, and is no justification for the circuit court in assuming jurisdiction. That case was brought in the name of the Missouri Railroad and Warehouse Commissioners in a Missouri court to enforce the plaintiffs' order forbidding excessive and illegal rates for local travel over the Boonville bridge across the Missouri river. Some of

the reasons why that case is not a precedent here are as follows:

1. Neither the report in the *Missouri Case* in 183 U. S., 53, nor the report of the same case in the supreme court of Missouri in 151 Mo. 644, shows that the case was brought in a Missouri court having jurisdiction of civil cases in which the state is a party, by virtue of a constitutional provision construed by the highest judicial tribunal in the state to include cases in which the state has a governmental as well as a pecuniary interest.

2. In the Missouri court the state was not a party plaintiff, and the Missouri Railroad and Warehouse Commissioners, as plaintiffs, made no pretense in their petition of exercising sovereignty on behalf of the state of Missouri or of suing for the benefit of the state of Missouri. The petition is set out in full in 151 Mo. 648,650, and contains no allegation that disobedience of the order of the commissioners resulted in irreparable injury to the public or that the sovereign had any interest in the suit either pecuniary or governmental.

3. In the Missouri court there was an attempt to retain jurisdiction by showing a pecuniary interest on part of the state by reason of its liability for costs in the event of an adverse decision, and by the hope of recovering penalties in case of a victory.

4. Under the statutes of Missouri a private person could maintain a suit to enforce the commission's orders if interested therein, and the commissioners in bringing suit for such a purpose possessed no greater degree of sovereignty than a private individual. They acted for shippers and not for the state. The petition, therefore, did not disclose a sovereign seeking an injunction to promote the general welfare by preventing injury to the public.

5. The right of a sovereign to apply to its own courts for any proper assistance to prevent wrongdoing from

resulting in injury to the general welfare was not presented by counsel in the *Missouri Case*.

In the foregoing particulars there is irreconcilable conflict between the *Missouri Case* and the facts and questions presented by this application for mandamus, but if from any possible standpoint the *Missouri Case* can be cited as a precedent for the doctrine that the state of Nebraska cannot maintain in its own name in the supreme court of Nebraska a suit to enjoin the Chicago, Burlington & Quincy Railroad Company from injuring the public by extortion, discrimination and defiance of constituted authority in direct violation of statute, unless its pecuniary interests are involved, then the *Missouri Case* is at variance with the following doctrine announced by Mr. Justice BREWER *In re Debs*, 158 U. S., 584:

"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

If the *Missouri Case* can be construed into an authority for retaining jurisdiction in the circuit court of the United States for the district of Nebraska on removal from the state court, then it is also in conflict with the recent decision of this court in *Burton v. United States*, 202 U. S., 344. The *Burton Case* was a prosecution by the United States under an act of congress forbidding a senator or other government official to "receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceed-

ing, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever." Senator Burton in violation of this federal statute appeared before the postoffice department and for compensation attempted to prevent the issuance of an order to exclude from the mails matter intended for the promotion of a fraudulent scheme. The suit was defended on the ground that the United States was not a party to or interested in the proceeding before the postoffice department. In ruling on the question thus presented this court, by Mr. Justice HARLAN, said:

"It is said that within the meaning of the statute the United States is not interested in any proceeding or matter pending before an executive department, unless it has a direct moneyed or pecuniary interest in the result. Under this view, senators, representatives and delegates in congress, who are members of the bar, may regularly practice their profession for compensation before the executive departments in proceedings, which if not directly involving the pecuniary interests of the United States, yet involve substantial pecuniary interests for their clients as well as the enforcement of the laws of the United States *enacted for the protection of the rights of the public*. Such a view rests upon an interpretation of the statute which is wholly inadmissible. In our opinion, section 1782 excludes the possibility of such a condition of things, and makes it illegal for senators, representatives or delegates to receive or agree to receive compensation for such services."

The case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362, has also been cited to justify the jurisdiction assumed by the circuit court of the United States for the district of Nebraska. An examination of that case will show that it belongs to a class of cases wherein the fed-

eral courts assumed jurisdiction to prevent state officers from enforcing confiscatory rates for services of common carriers in defiance of the constitution of the United States. In violating the federal constitution, state officers are mere trespassers and do not represent the state. The state is an ideal person and can do no wrong. Its officers, therefore, do not truly represent an ideal person when they attempt in the name of the state to confiscate railroad property by means of confiscatory freight charges. In such a capacity state officers are individual trespassers and their lawless acts are within the jurisdiction of the federal courts where the power to prevent infractions of the supreme law of the United States is unquestioned. To this class of cases belongs *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362. The facts presented by this application for mandamus are exactly the opposite. For the purpose of the state's motion to remand the Nebraska officers truly represented the state when they brought a suit in equity and invoked the power of the sovereign to prevent the Chicago, Burlington & Quincy Railroad Company from violating valid Nebraska statutes and from thus injuring the public by oppression, extortion and discrimination. The Nebraska officers acted in pursuance of valid statutes to enforce lawful enactments of the Nebraska legislature, and for the purpose of jurisdiction the circuit court of the United States cannot assume the Nebraska statutes are void, and that its officers are trespassers, when the contrary appears in the state's petition in the supreme court of Nebraska, which is the sole test of jurisdiction in both state and federal courts.

But if the *Reagan Case* can be construed into a justification of jurisdiction assumed by the federal court in the present case on the ground that the state cannot sue in its own courts to prevent injury to the public, unless it has a property or pecuniary interest in the suit, then it

is in conflict with the doctrine announced in the later cases of *In re Debs*, 158 U. S., 584, and *Barton v. United States*, 202 U. S., 344.

The state of Nebraska has not and cannot consent to the jurisdiction of the circuit court of the United States. On the contrary the state filed its motion to remand which is "equivalent to a special plea to the jurisdiction of the court." (*Railway Co. v. Swan*, 111 U. S., 384.)

On the face of the petition in the state court the circuit court has no jurisdiction and can acquire none.

A writ of mandamus, therefore, should issue to the United States district judges, who overruled the motion to remand, commanding them to send the case back to the state court.

III.

**Where a state court has no jurisdiction of a case, a circuit court of the United States can acquire none by removal.**

If the circuit court of the United States was correct in holding that the state of Nebraska is not a party to the suit in the state court, the supreme court of Nebraska had no jurisdiction, the federal court could acquire none by removal, and the case should be remanded to the state court.

In overruling the motion to remand and in assuming jurisdiction of the case removed from the state court to the federal court, the circuit court of the United States held that no suit was commenced in the supreme court of Nebraska to which the state was a party, but held that the attorney general and the railway commissioners were plaintiffs in the state court and retained jurisdiction of their cause for adjudication. The judgment overruling the state's motion to remand responded to the following

rulings copied from the opinion of the circuit court of the United States, as it appears in the petition herein:

"The complainants' bill does not allege that any pecuniary interest of the state is affected. In the arguments of complainants the only interest of the state claimed to be involved is its governmental interest in the welfare of its citizens, and it is declared that a state has the right to enjoin a violation of the law. * * * In this case there is no property right of the state involved, nor is this suit brought in aid of police power nor as a direct prosecution or suit for penalties, and the state as an artificial person has no real interest in the action."

If these holdings are correct, if the state has no real interest in the suit, if the state is not a real party plaintiff, if the state did not commence a suit in its own name and if the state must keep out of its courts of equity except when its property is at stake, then it necessarily follows that the supreme court of Nebraska never had any jurisdiction, the circuit court could acquire none by removal, and the writ of mandamus should issue to compel the remanding of the case, for the reason that a circuit court of the United States can acquire by removal no greater jurisdiction than that of the state court from which the cause is removed, and where a state court has no jurisdiction the federal court can acquire none by removal. These propositions are elementary and no extended reference to the cases on this point will be made.

In *Thrasher v. Omaha & St. L. R. Co.*, 102 Fed., 1, Judge SHIRAS adopted the following rule:

"An action in a state court against a railroad company to recover overcharges alleged to have been exacted from plaintiff in violation of the interstate commerce act is one in which the state court is without jurisdiction of the subject-matter, and a federal court cannot, therefore, acquire jurisdiction by removal."

*Swift v. Philadelphia & R. R. Co.*, and other *Swift*

*Cases*, 58 Fed., 558, were suits removed from a state court of Illinois to the circuit court of the United States for the northern district of Illinois on the ground of diverse citizenship. The actions were brought in the state court to recover excessive charges on interstate shipments of packing house products. In these cases Judge GROSSCUP said:

"Those counts of the declaration which proceed directly upon the interstate commerce act cannot be sustained in these suits. The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts, acquired by the fact of diverse citizenship."

*East Tennessee, Va. & Ga. R. R. Co. v. Southern Tel. Co.*, 112 U. S., 306, was a proceeding commenced in a probate court of Alabama under a state statute authorizing telegraph companies to condemn and use property of individuals and corporations for telegraphic purposes. On the ground of diverse citizenship the case was removed to the circuit court of the United States for the middle district of Alabama. In referring to the nature of the proceeding and the jurisdiction of the federal court this court said:

"This is a proceeding under the statute of Alabama to ascertain the amount of compensation to be paid the railroad company for the appropriation of its property to the uses of the telegraph company. This is the single question to be settled. The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act. * * * The courts of the United States,

on the removal of the proceeding from the probate court, were clothed with no greater power in the premises than the courts of the state would have possessed if their jurisdiction had been preserved."

To repeat what has already been asserted herein, it is elementary that by removal the federal court could acquire no jurisdiction unless the state court from which the cause was removed had jurisdiction. If the state was not a party in the supreme court of Nebraska that court had no jurisdiction over the case at the time of the removal and could acquire none by process, by consent of parties or by other means. This is shown on the face of the petition, when considered in connection with the Nebraska constitution and Nebraska decisions of which the federal courts take judicial notice.

That the state is a party is the sole ground on which it was possible for the supreme court of Nebraska to acquire jurisdiction of the subject-matter or of the parties, and whenever it is determined that the state is not a party, jurisdiction of the supreme court of Nebraska necessarily fails. The supreme court of Nebraska has no original jurisdiction except "in cases relating to the revenue, *civil cases in which the state shall be a party*, mandamus, quo warranto, habeas corpus." This original jurisdiction is granted and limited by section 2, article 6 of the Nebraska constitution. It is as follows:

"The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision. It shall have original jurisdiction in cases relating to the revenue, *civil cases in which the state shall be a party*, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

This section of the constitution is a grant of power and limits the original jurisdiction of the supreme court to

*civil cases in which the state shall be a party, mandamus, quo warranto and habeas corpus.* This has been adjudicated by the supreme court of Nebraska in *State v. Hall*, 47 Neb., 582, where the opinion on the effect of section 2, article 6 of the constitution, contains the following:

"That provision, it was held in *Miller v. Wheeler*, 33 Neb., 765, is a grant of power and by implication *limits the original jurisdiction of this court to the subjects therein enumerated.*" (*State v. Hall*, 47 Neb. 582.)

This ruling is part of the constitution itself and is binding on the federal courts. (*Sheppard v. Graves*, 14 How., 504; *Shelby v. Guy*, 11 Wheat., 365; *Olson v. Smith*, 25 Sup. Ct. Rep., 52; *Knights Templars v. Jarman*, 187 U. S., 197.)

The limitation of the original jurisdiction of the supreme court, therefore, has not been and cannot be enlarged by legislation beyond the subjects enumerated in the constitution, namely, "*cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus.*"

Under the constitution of Nebraska, therefore, the supreme court of Nebraska has no original jurisdiction of an injunction suit to which the state is not a party and could acquire none by any means whatsoever. If the state of Nebraska is eliminated as a party plaintiff, the attorney general and the railway commissioners, the only remaining plaintiffs, have no power to bring a civil suit in the supreme court of Nebraska, and with the state eliminated as a party plaintiff the state supreme court has no original jurisdiction either over the parties or the subject-matter. In the injunction suit brought in the state court against the Chicago, Burlington & Quincy Railroad Company the jurisdiction of the supreme court was invoked on the sole ground that the state was a party plaintiff, and if the circuit court is correct in holding

that the state is not a party, has no interest in the suit and must keep out of its courts of equity except when its property is at stake, the supreme court had no jurisdiction and the federal court acquired none by removal or otherwise.

From an examination of the record on which the circuit court assumed jurisdiction and refused to remand the case, the following are the only reasonable deductions:

If the state of Nebraska *is a party* in the supreme court of Nebraska, it is not a citizen within the removal acts of congress, the case is not removable, and the circuit court acquired no jurisdiction.

If the state of Nebraska *is not a party* in the supreme court of Nebraska, the supreme court of Nebraska had no jurisdiction over the parties or subject-matter of the suit, and the circuit court could acquire none by removal.

In any event the circuit court is without jurisdiction and it is earnestly insisted that mandamus should issue to compel the remanding of the case to the state court.

Respectfully submitted,

WILLIAM T. THOMPSON,
Attorney General,
WILLIAM B. ROSE,
Deputy Attorney General,
*Counsel for the State of Nebraska.*

Lincoln, Neb., November 25, 1907.

Office Supreme Court, U. S.
FILED.
MAR 16 1908
JAMES H. McKENNEY,
CLERK.

No. 15 Original.

# IN THE SUPREME COURT

## OF THE UNITED STATES

United States of America,
ex rel. State of Nebraska,
*Petitioner,*

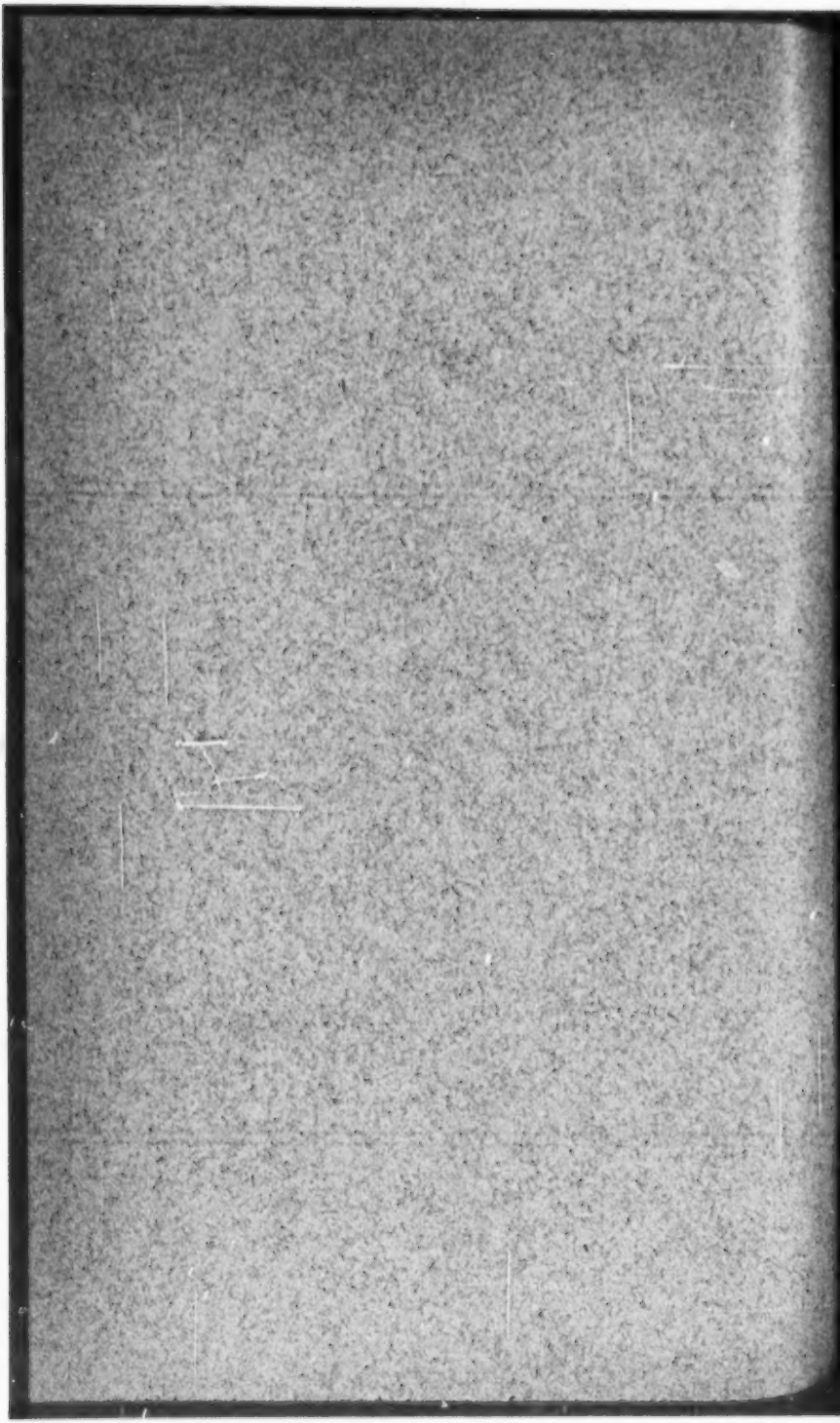
*v.*

William H. Munger and Thomas C. Munger, United States district judges for the district of Nebraska
*Defendants.*

## ORIGINAL APPLICATION FOR MANDAMUS

## SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER.

*WILLIAM T. THOMPSON, Attorney General*
*WILLIAM B. ROSE, Deputy Attorney General*
*Counsel for Petitioner*



# IN THE SUPREME COURT

## OF THE UNITED STATES

| | |
|---|---|
| **United States of America, ex rel. State of Nebraska,** *Petitioner,* | |
| *v.* | **No. 15 Original.** |
| **William H. Munger and Thomas C. Munger, United States district judges for the district of Nebraska** *Defendants.* | |

## SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER.

### STATEMENT.

*May it Please the Court:*

The facts are stated in the petition and original brief and argument of petitioner in support of the application for a writ of mandamus directing the United States district judges for the district of Nebraska to remand to the supreme court of the state of Nebraska a case wherein the state of Nebraska, William T. Thompson, attorney general, Nebraska State Railway Commission, Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission are plaintiffs, and the

Chicago, Burlington & Quincy Railroad Company is defendant.

Since the original brief and argument of petitioner was prepared, the supreme court of Nebraska, in construing Nebraska statutes and the state constitution, has discussed and passed upon every question presented by the petition for mandamus in this case. The opinion was handed down March 5, 1908, in the case of the *State of Nebraska v. Pacific Express Company*, and is not yet reported. The purpose of that suit was to enjoin the Pacific Express Company from exacting, for its services as a common carrier between stations and places in Nebraska, rates or charges in excess of those limited by a Nebraska statute. In that case it was held that the State of Nebraska was the real and proper plaintiff; that injunction was the proper remedy; that the suit was maintainable, though the state had no pecuniary interest in the result; that the failure to put in force reasonable rates fixed by statute was a public wrong; that the supreme court had jurisdiction derived from the Nebraska constitution; and that the attorney general had power to bring and prosecute the suit in the name of the state of Nebraska, the real party plaintiff.

To present to this court the opinion of the supreme court of Nebraska, showing the construction put upon the Nebraska constitution and statutes by the state court of last resort, and to make reply to the arguments of defendants in the case at bar, leave to file this supplemental and reply brief is respectfully asked.

## ARGUMENT.

### I.

**No amount of judicial discretion can supply a want of jurisdiction; and in passing on a motion to remand a case from a federal court to a state court for a want of jurisdiction appearing on the face of the record, the federal court cannot justify its usurpation on the ground that judicial discretion was exercised and that appeal and not mandamus is the proper remedy.**

**There must be jurisdiction before there can be discretion.**

**"Where the circuit court refuses to remand to the state court a case removed to it, but over which it has no jurisdiction, mandamus from this court is the proper remedy." (Ex parte Wisner, 203 U. S., 449.)**

In their argument defendants attempt to justify their assumption of jurisdiction to hear and determine the cause of the state against the Chicago, Burlington & Quincy Railroad Company on the ground that in overruling the state's motion to remand they exercised a judicial discretion which cannot be controlled by mandamus, and that their holding, if erroneous, can only be corrected on appeal or error.

The answer to this point is: The only question presented to the district judges by the motion to remand was their want of jurisdiction. On the face of the record they had no jurisdiction. They had no discretion to usurp a jurisdiction having no existence. An erroneous assumption of jurisdiction does not confer power to hear a cause. A court must correctly determine its jurisdiction before any judicial discretion exists. No amount of judicial discretion can supply a want of jurisdiction. A court must have jurisdiction before it can exercise discretion. Mandamus is the proper remedy to prevent the exercise of a jurisdiction unlawfully assumed. The rules announced by this court in using mandamus to keep inferior courts within their jurisdiction are as follows:

"No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case." (*Ex parte* Bradley, 7 Wall., 377.)

"It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds." (*Virginia v. Rives*, 100 U. S. 316.)

"Where the circuit court refuses to remand to the state court a case removed to it, but over which it has no jurisdiction, mandamus from this court is the proper remedy and not prohibition." (*Ex Parte Wisner*, 203 U. S., 449.)

That these principles are applicable to the case at bar there is no reasonable ground to dispute. The motion to remand presented alone the question of the jurisdiction of the federal court. The grounds of the motion to remand are:

1. This court has no jurisdiction to hear and determine the cause.

2. This court has no jurisdiction over the subject-matter set forth and contained in plaintiffs' petition.

3. This court has no jurisdiction of the parties herein, nor of any of them. (Petition, p. 16.)

On this motion to remand the case to the supreme court for want of jurisdiction of the federal court, the sole test was a matter of law depending alone on the petition filed in the state court. The sole ground of removal was diverse citizenship. No question of a severable controversy was presented. The petition disclosed on its face, as hereinafter shown, that a single injunction was sought in favor of the state of Nebraska, the only real plaintiff, against the one defendant, the Chicago, Burlington & Quincy Railroad Company. Ground of removal does exist unless found in the petition in the state court. (*Graves v. Corbin*, 132 U. S., 571; *East Tennessee R. Co. v. Gryson*, 119, U. S., 240; *Merchants' Cotton Press Co. v. Ins. Co.*, 151 U. S., 368; *Minnesota v. Northern Securities Co.*, 194 U. S., 64; *Postal Telegraph Co. v. Alabama*, 155 U. S., 487; *Tennessee v. Bank of Commerce*, 152 U. S., 454.) As shown by a subsequent

discussion of the question of the real party plaintiff, the petition shows on its face that the state of Nebraska is a proper and necessary suitor, and the state officers are mere nominal parties, officers or agents, having no part in determining the question of removal raised on the motion to remand for want of jurisdiction.

As already stated the petition shows on its face that the state is the only real party plaintiff, and not being a citizen within the removal acts of congress (*Upshur v. Rich*, 135 U. S., 470; *Postal Tel. Cable Co. v. Alabama*, 155 U. S., 487), the circuit court of the United States acquired no jurisdiction by removal.

The case at bar, therefore, falls within the rule of *Ex parte Wisner*, 203 U. S., 449, wherein this court by Mr. Chief Justice Fuller said:

"Our conclusion is that the case should have been remanded, and, *as the circuit court had no jurisdiction to proceed*, that mandamus is the proper remedy."

Defendants attempt to distinguish *Ex parte Wisner* 203 U. S., 449, from the case at bar, on the ground that want of jurisdiction in the federal court arose from the fact the suit removed from the state to the federal court could not originally have been brought therein, since plaintiff was a citizen of Michigan, defendant was a citizen of Louisiana, and the suit was brought in a Missouri court and removed to the circuit court of the United States for the eastern district of Missouri. On these facts it is asserted by defendants that the federal court, being without authority to acquire jurisdiction by original suit or by removal, could exercise no judicial discretion in the case.

In principle this is no distinction. Where the state court had jurisdiction of a case subsequently removed to a federal court which is without jurisdiction, no discretion is conferred by the removal and it is immaterial how the jurisdiction was defeated. Want of jurisdiction from any cause, appearing on the face of the record, makes mandamus the proper remedy, where the federal court refuses to perform the duty to remand. Such cases are outside the

discretion and jurisdiction of the court to which they are removed. (*Virginia v. Rives*, 100 U. S., 316; *Virginia v. Paul*, 148 U. S., 107; *Ex parte Wisner*, 203 U. S., 449.)

The author of the opinion in *Ex parte Wisner*, 203 U. S., 449, makes it clear in a subsequent ruling that want of jurisdiction appearing on the face of the record *from any cause*, is ground for awarding the writ against a judge who refuses to remand a case to a state court having jurisdiction. The principle stated in *Ex parte Wisner* is repeated in a latter case, as follows:

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. *In re Grossmayer, Petitioner*, 177 U. S., 48; *In re Hohorst, Petitioner*, 150 U. S., 653; *And so where the court assumes to exercise jurisdiction on removal when on the face of the record absolutely no jurisdiction has attached. Virginia v. Paul*, 148 U. S., 107; *Ex parte Wisner*, 203 U. S., 449." (*In re Pollitz*, 206 U. S., 331.)

In their attempt to make a distinction, however, defendants failed to show that the state of Nebraska, the only real plaintiff in the Nebraska court, could have brought its suit originally in the circuit court of the United States for the district of Nebraska.

The eleventh amendment to the constitution of the United States, passed in consequence of the decision in *Chisholm v. Georgia*, 2 Dall., 419, was intended to take away the judicial power of the courts of the United States over all controversies between states and individuals.

*In Rhode Island v. Massachusetts*, 12 Pet., 731, Mr. Justice Baldwin, in holding that the eleventh amendment did not affect the jurisdiction of this court over controversies between two states, remarked that "it took from this court all jurisdiction, past, present and future, of all controversies between states and individuals."

*In Hollingsworth v. Virginia*, 3 Dall., 381, pending when the eleventh amendment was adopted, it was held

that the adoption of the amendment operated to terminate the power of this court over a suit between a state and a citizen of another state, previously brought. We have shown in our first brief that the subject-matter of the suit alleged to have been wrongfully removed pertained solely to administering and enforcing purely local statutes of Nebraska. Section 1 of the act of March 1, 1887, 24 Stat. c. 373, p. 552, defining the jurisdiction of the circuit courts of the United States, which was under consideration in *Ex parte Wisner*, 203 U. S., 445, does not confer upon those courts any authority over controversies between states and individuals. Such authority not being delegated to the circuit courts of the United States, actually or colorably, either by the constitution or by any act of congress, it is clear that the state of Nebraska could not have maintained its suit if it had been originally brought in a circuit court of the United States. The suit being one which could not have been originally brought in the circuit court of the United States, it cannot be transferred to that court by removal. *Ex parte Wisner* is, therefore, a controlling and conclusive precedent. Indeed there is stronger ground for granting the writ of mandamus here, upon the application of a state, because of the direct constitutional prohibition from exercise of judicial power, than was shown in *Wisner's Case*, where want of jurisdiction arose out of the terms of a statute. It would be anomalous to deny the writ upon the application of a state which by the *constitution* can never be subjected to the judicial power of the courts of the United States, and at the same time award the writ at the suit of an individual who, in many situations, is subject to such judicial authority.

There is also authority for holding on another ground that the state could not have brought its suit originally in the United States circuit court. In *Dey v. Chicago M. & St. P. R. Co.*, 45 Fed., 82, in an opinion by Judge Shiras, it was held that a state cannot take its local statutes into the federal court for execution and that an action for that purpose cannot be brought originally in the circuit court of

the United States. In principle, therefore, there is no distinction between the case at bar and *Ex parte Wisner*, 203 U. S., 449.

To justify their order retaining jurisdiction by removal defendants cite *In re Pollitz*, 206 U. S., 323. This case appears to be cited to the point that the federal district judges exercised discretion in retaining jurisdiction and that mandamus will not take the place of error or appeal.

The author of the opinion in distinguishing that case from *Ex parte Wisner*, 203 U. S., 449, also distinguishes it from the case at bar. The report of the case *In re Pollitz*, 206 U. S., 323, shows that Pollitz, a citizen of New York, sued the Wabash Railroad Company, a citizen of Ohio, and others, in the supreme court of New York; that the Wabash Railroad Company removed the case to the circuit court of the United States for the southern district of New York; that the grounds of removal were diverse citizenship between Pollitz and the Railroad Company, and that the controversy was distinct and separable as between them and determinable without the presence of the other parties. On the facts disclosed by the report, diverse citizenship between the removing defendant and plaintiff was perfect. The federal court had jurisdiction by removal with power to adjudicate the issue as to a separable controversy. These facts show that *In re Pollitz*, 206 U. S., 323, relied upon by defendants, has no application whatever to the case at bar. Any doubt as to this proposition ought to be dispelled by the following excerpts from the opinion:

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to

review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

"In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the circuit court against the railroad company as sole defendant." (*In re Pollitz*, 206 U. S. 331.)

II.

**The power to regulate commerce wholly within Nebraska belongs to the state itself and does not shift to executive officers, when equity becomes the only means of making it effective.**

**The state of Nebraska is the only real plaintiff in a suit in the supreme court of Nebraska to enjoin a railroad company from committing a public wrong by charging extortionate rates for services in violation of the lawful rates fixed by a Nebraska statute, and the United States circuit court can acquire no jurisdiction of such a suit by removal, since the state is not a citizen within the removal acts of congress.**

The argument of defendants that the attorney general and the members of the Nebraska State Railway Commission are the real parties and that the state of Nebraska has no interest in the controversy and is not a plaintiff is entirely without merit.

The power to regulate commerce wholly within Nebraska is by the constitution and laws of the United States left entirely with the state. This power includes the authority to control railroads and to fix reasonable rates for services. It is not left by the federal constitution to state officers, courts or individual members of the legislature, but to the state itself, and it includes also the power to make state control of internal commerce of the state effective. Otherwise the power would amount to nothing, when resisted by powerful railroad corporations having more facilities for their operation and more business and more property than the state itself. The burden of state responsibil-

ity does not shift from the state to minor officers when that power is put to the supreme test by resistance of state laws. The attorney for the state and other state officers, acting alone for the government, cannot at any stage of state control of internal commerce be substituted for the sovereign itself. Such a course would prevent the state of Nebraska from bringing in its own name, in its own courts, a suit to enforce obedience to its own statutes, though the purpose of the statutes and suit is to make effective a control of internal commerce of the state under a power left exclusively to the state by the federal constitution and conferred in direct terms by the constitution of Nebraska.

To enforce, by injunction, obedience to laws enacted for the regulation of internal commerce of the state, the state of Nebraska is the only real plaintiff. Such a suit is a suit to redress public wrong, to prevent injury to the people and promote the general welfare. It is a suit which is not within the removal acts of congress, and the United States circuit court for the district of Nebraska cannot acquire jurisdiction thereof by removal. Mandamus is a proper remedy to prevent the usurpation of such jurisdiction.

The state constitution makes railroads public highways, and confers upon the state power to control them and to regulate and fix reasonable charges for their services. The effect of this constitutional provision and the remedies arising thereunder are proper matters for the judicial determination of the supreme court of Nebraska, and rules so established are binding on the federal court, since they do not conflict with any provision of the constitution of the United States nor with any act of congress.

Reason and authority show that these propositions are sound. Investigation will prove they cannot be successfully refuted. Section 8, article 1, of the constitution of the United States, declares that congress shall have the power "to regulate commerce with foreign nations, and *among the several states*, and with the Indian tribes." In

defining the meaning of the power of congress to regulate commerce among the several states, the term "among the several states" has been held to leave to the state exclusive control of commerce wholly within its borders. The congress or the federal government has no more authority to control commerce wholly within a state than the state has to control commerce "among the several states." Each within its own jurisdiction is supreme. This doctrine was announced by Chief Justice Marshall in 1824 in the case of *Gibbons v. Ogden*, 9 Wheat., 1. In discussing the provision quoted from the federal constitution he said:

"The subject to which the power is next applied, is to commerce, 'among the several states.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different part of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *The completely internal commerce of a state, then, may be considered as reserved for the state itself.*" (*Gibbons v. Ogden*, 9 Wheat. 194.)

This doctrine was affirmed by this court in 1887, in an able opinion by Mr. Justice Field, who said:

"The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government." (*Sands v. Manistee River Imp. Co.*, 123 U. S., 295.)

In *Moore v. American Transportation Co.*, 24 How. 39, this court also said:

"The purely internal commerce and navigation of a state is exclusively under state regulation."

In the recent case of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S., 210, Mr. Justice Brown, in giving effect to the same principle, said:

"Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls for the use of the same."

In *Greer v. Connecticut*, 161 U. S., 519, the language herein quoted from the opinion of Mr. Chief Justice Marshall was reproduced as a correct interpretation of the power of the state to control internal commerce.

The power, therefore, to control railway commerce within the state of Nebraska and to regulate the tolls for services is by the constitution of the United States, as interpreted by this court, left to the state itself. In the foregoing excerpts from the opinions of this court, there is no intimation that this sovereign power was in any event conferred on officers of the state government. The power reposes in the state in its sovereign capacity. In that capacity the state has, by its constitution and statutes, provided means for exercising its control over internal commerce. To that end it has established constitutional provisions and enacted statutes. It has made provision for exercising this power by means of legislation, by the action of a railway commission, and by imposing duties on executive officers and courts. The power of regulation, however, is in the entire state and has not been divested or committed to the legislature, to executive officers, or to the courts.

Each department of the government has its duties in enforcing state control over common carriers and in making the power of the state effective, but the power itself is in the state. Section 4, article 11, of the Nebraska constitution, provides:

"Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." (Compiled Statutes, p. 74.)

Pursuant to this power of the state to regulate its internal commerce and the authority left by the constitution of the United States with the state of Nebraska, the legislature in 1907 duly enacted a statute making it unlawful for any express company operating in the state of Nebraska to charge or receive for the *intra*state transportation of merchandise within the state of Nebraska any sum in excess of seventy-five per cent of the rates in force January 1, 1907. Notwithstanding this statute and the duty of the Pacific Express Company to obey it, it exacted extortionate rates in excess of those fixed by law, and its powers of resistance were beyond the ordinary remedies at law, either public or private, civil or criminal, and the state of Nebraska, and the people thereof, were without any adequate remedy to enforce the lawful rates so fixed by statute, except by means of a suit in equity instituted and maintained by the state of Nebraska on behalf of the people for the public welfare and to prevent a public wrong and a public injury. Such a suit was brought in the supreme court of the state against the Pacific Express Company.

Interpretation of the constitutional and statutory provisions on the subject of internal commerce of the state is by law committed to the supreme court of Nebraska. In the exercise of that duty, the supreme court, in the case of *State of Nebraska v. Pacific Express Company*, March 5, 1908, handed down the following opinion, the syllabus being by the court:

State of Nebraska, *Plaintiff*,
*v.*
Pacific Express Company, *Defendant*.
No. 15307.

SYLLABUS.

1. An act which merely provides "this act shall take effect on and after its passage and approval" does not "express an emergency" under the requirements of section 24, article 3 of the constitution, and does not take effect until three months after the adjournment of the legislative session.

2. Express companies operating over the lines of railroad corporations exercising a public franchise in this state are equally subject to state control and regulation with the railroad companies over whose lines they operate, within the limited field of the business of transportation which they occupy.

3. The attorney general may, on behalf of the state, maintain an action in equity to enjoin common carriers whose rates are fixed by law from violating the terms of the statute and exacting unlawful and excessive rates and charges.

4. The jurisdiction conferrred upon this court by the constitution "in all civil cases in which the state shall be a party" is not confined to cases in which the state has a mere pecuniary interest, but may extend to all cases in which the state, through its proper officers, seeks the enforcement of a public right or the restraint of a public wrong.

5. A wrong of a nature which affects the rights and interests of people living in almost every city, town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of this court.

6. Until otherwise prescribed by competent authority, by the provisions of sections 2 and 3, chapter 92, Session Laws of 1907, express companies doing business in this state, after the law took effect, may charge, for the transportation of merchandise within this state, any sum not exceeding seventy-five per cent of the rate in force on the 1st day of January, 1907, and thirty days were allowed after the act was in force for such companies to file with the state railway commission the schedule of rates and classifications in force on that date.

## OPINION

LETTON, J.

On July 5, 1907, the attorney general filed, in the name of the state of Nebraska, petitions against the Adams Express Company and four other express companies doing business in this state, alleging in substance that the defendants are common carriers engaged in carrying on an express business over various lines of railroad in the state of Nebraska. That the legislature of 1907 passed the following act, known as Senate File 355:

"An act to provide for the filing of schedules of rates charged by express companies for the transportation of money or merchandise within the state of Nebraska; to fix a maximum charge for such service; to provide for the enforcement of the provisions of this act; and for penalties for failure to comply with its provisions.

"*Be it Enacted by the Legislature of the State of Nebraska*:

"Sec. 1. (Express Company defined.) All persons, associations or corporations engaged in the transportation of money or merchandise for a money consideration in cars other than freight cars and on trains other than freight trains shall be deemed an express company within the meaning of this act.

"Sec. 2. (Schedule of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission, a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D., 1907.

"Sec. 3. (Rates.) Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent of the rate as shown in the schedule provided in section 2 of this act until after the state railway commission shall have provided a greater rate.

"Sec. 4. (Same, minimum.) Provided that nothing in this act shall be construed to change the prepaid rates on merchandise weighing one (1) pound or less and provided further, that no provision of this act shall reduce any special contract rate in force for the transportation of cream, milk or poultry or any charge to a sum less than fifteen cents; and provided further that nothing in this act shall abridge the authority of the railway commission to make a reduction in any rate provided for in this act.

"Sec. 5. (Violation of act.) If any express company

should fail to comply with the provision and conditions of this act, they shall be fined on conviction a sum not less than ten dollars or more than one thousand for each offense.

"Sec. 6. (Enforcement of act.) The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act.

"Sec. 7. (Emergency.) This act shall take effect on and after its passage and approval.

"Approved April 5, 1907."

That it is the duty of the defendant to obey the statute and put in force the rates fixed by the legislature in said act, but that the defendant has put in force unlawful charges and rates for *intra*state transportation of merchandise within the state of Nebraska and is exacting from the people of the state of Nebraska unlawful, exorbitant and unconscionable rates and charges; that individual citizens who are interested are unable to cope with the defendant, and that it is the duty of the state to protect the people from the unlawful, exorbitant rates and charges exacted by the defendant.

The prayer is for an injunction to prevent the defendant from making or putting into effect any other or different charges from those prescribed in the act, or from interfering with or attempting to change the rates and charges established by law for its services.

An answer was filed which contained among other things an allegation that the law was not effective on July 5, 1907, on account of not having been passed with an emergency clause.

The attorney general filed a motion to strike this part of the answer on the ground that, under the provisions of section 7 of the act, which provides "This act shall take effect on and after its passage and approval," the act took effect as soon as passed and approved by the governor upon April 5, 1907.

The motion to strike was overruled, the court being of the opinion that the act failed to comply with that part of section 24, article 3 of the constitution, which provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct;" and that the act, therefore, did not take effect until three calendar months after the adjournment of the session.

By consent, this answer of the defendant company has been withdrawn and an answer in the nature of a plea in abatement has been filed in order to present certain preliminary questions, which if the contention of the defendant is upheld would abate the action. In substance it is pleaded that the state of Nebraska has no power or authority under the constitution and laws of the state to maintain the action; that the supreme court has no juridiction; that the petition does not show whether the defendant is a person, association or corporation; that the rates charged at the time the suits were begun were those in force prior to the 1st day of January, 1907, and that the rates provided for in the act were not in force and effect at the commencement of the present suit and that the defendant was under no duty under the terms of the act to charge the rates therein provided for.

For convenience, we will consider the first and second points together. The defendant asserts that the state of Nebraska has no power or authority under the constitution and laws of this state to maintain the suit and that this court has no jurisdiction, while the attorney general maintains that the state may maintain a suit in equity in this court to protect the general welfare by protecting the public from oppressions, extortions and other injuries, though the state of Nebraska has no pecuniary or property interests in the suit.

Section 22, article 6 of the constitution, provides:

"The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."

Section 2, article 6, relating to the supreme court, provides:

"It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

Referring to that clause of section 22, which provides that the legislature shall provide by law in what manner and in what courts suits shall be brought, it was held in *State v. Moores*, 56 Neb., 1, and also in *In re Petition of Attorney General*, 40 Neb., 402, that, even though the provisions of section 2 may not be self-executing, still they have already been sufficiently supplemented by legislation so that the legislature has actually provided by law in what manner suits by the state should be brought, as required by section 22, article 6.

But it is contended that the state is not properly a party in this case, and it is argued that no suit can be instituted by the state in the exercise of its constitutional powers or "sovereign capacity," except such suit is expressly provided for by statute, that the act in question has, by its terms, imposed upon the executive department the duty of its enforcement and that it is, therefore, beyond the power of the attorney general to shift the burden of executing the law from the executive to the judicial department. That section 6 of the act provides, "the Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act," and, therefore, that the railway commission is the only body vested with authority to enforce the provisions of the act. It is to be noticed, however, that no powers are conferred upon the railway commission by the statute with respect to the enforcement of the law other or greater than those given to private individuals. There is no procedure specified by which that body may act directly on the offending carrier. The railway commission, if it seeks to enforce the law, must travel the same road as any private citizen, appeal to the courts for relief, or for the punishment of the carrier who violates the law. The main question presented by defendant's argument is whether the state of Nebraska, in behalf of its citizens concerned with the transportation of merchandise, may apply to this court in an original suit in which it has no pecuniary interest for relief from unjust exactions and extortionate charges made by express companies engaged as common carriers within the state.

It is alleged in the petition that the defendant is carrying on its business over various lines of railroad in the state of Nebraska for hire and is continually transporting money and merchandise for a money consideration, in cars other than freight cars and on trains other than freight trains, between stations and between towns and places in the state of Nebraska. The defendant then is a public service corporation engaged in transacting business for the public over the public highways of the state of Nebraska. The railroad companies over whose lines of railroad its business is transacted have had conferred upon them a certain portion of the sovereignty of the state of Nebraska, the right of eminent domain, so that they might exercise it for public purposes.

Such railway companies may carry on in their own corporate capacity the carriage of goods and chattels,

money, merchandise or any other articles which are susceptible of carriage by railroad transportation, or they may permit subordinate agencies, either personal or corporate, to engage in the transportation of money or merchandise over their lines under special care and in a more expeditious manner than if carried upon ordinary freight trains. The rights, the liabilities and the duties of the defendant, therefore, as a common carrier, are measured by the rights, liabilities and duties of the railroad company over whose lines it operates and within the boundaries of the limited field of transportation within which the express company carries on its energies. The express company cannot be held liable for any violation of the duties of the original carrier in a department or sphere with which it is not concerned in the conduct of its business, but within the limited scope of the field of transportation which is now occupied exclusively by express companies, their relation to the public as common carriers is the same as that of the railroad company. The fountain cannot rise higher than its source, and the express company and the railroad company are both subject to state control and reasonable regulation. The right of regulation by the state of the business of common carriers, especially of those to whom has been granted the right of eminent domain, is beyond discussion. The doctrine has now become so well established as to become one of the fundamentals of the law. *Wisconsin, M. & P. R. Co. v. Jacobson,* 179 U. S., 287, 21 Sup. Ct. Rep. 115; *Atlantic C. L. R. Co. v. North Carolina Cor. Com.,* 206 U. S., 19.

The grant of the right of eminent domain implies the consideration that the tolls, rates and charges to be made to the public for the use of the railroad shall be just and reasonable, and not extortionate, and that no unjust discrimination shall be made. The power and authority which granted the franchise to the railroad company to become a corporation and to exercise the right of eminent domain and take private property for public use, even against the will of the owner, is the same power which is exercised to promote the public safety by requiring the lines to be fenced, road-crossings to be made, cattle-guards constructed, which regulates the transportation of live stock, prohibits the exaction of unreasonable and exorbitant charges for carrying of passengers and freight. In granting the franchises the state did not surrender or abdicate its sovereignty, nor set in operation a power or agency which it thereby lost the right to control. This idea was firmly planted in our constitution at its birth, and the courts have consistently

preserved its benefits to the people of this state. (*State v. Republican Valley R. Co.*, 18 Neb., 512; *Chicago B. & Q. R. Co. v. State*, 47 Neb. 549; *State v. Missouri Pacific R. Co.*,—N. W.—(Neb.) filed this day.)

The defendant says: "It is only permissible to the state, in any jurisdiction, even in the absence of constitutional or legislative authority, to litigate in its sovereign capacity cases involving the jeopardy of the public health or the public peace. No well considered case can be found holding the contrary." Elsewhere, in the brief of counsel, it concedes that the state may maintain actions in which it has a pecuniary interest. But we think the state has not thus abrogated its powers or denied itself one of the most powerful agencies for the ascertainment of fact and the application of a remedy, if needed, in matters that affect the regulation and control of public franchises. A sufficient answer to this contention is found in the following quotation from the opinion of Justice Brewer, in *In re Debs*, 158 U. S. 584.

"Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrong doing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

In *Stockton v. Central R. R. Co.*, 50 N. J., Eq. 52, 78, it is said:

"The inquiry is, whether the attorney general may invoke the power of this court to restrain further operations under, and in pursuance of, the lease. It is well settled that where a corporate excess of power tends to the public injury or to defeat public policy it may be restrained in equity at his suit. In *Attorney General v. Delaware and Bound Brook R. R. Co.*, 12 C. E. Gr. 631, 633, in pronouncing the opinion of the court of errors and appeals, Mr. Justice Dixon said: 'In equity as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called civil information for their protection. The state is not left without redress in its own courts, because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility,

and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the court on such questions of public moment.' Professor Pomeroy, in his work on Equity Jurisprudence, sec. 1093, states the rule in this language: 'When the managing body are doing, or are about to do, an *ultra vires* act of such a nature as to produce public mischief, the attorney general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief.' "

In *Trust Co. v. Georgia*, 109 Ga., 751, though the court held that, under the facts, the lower court erred in granting the injunction, it carefully reviewed the authorities and said upon this point:

"Our conclusion, therefore, both from reason and a decided weight of authority is that the state, in her sovereign capacity, can appeal to the courts for relief by injunction, whenever either its property is involved, or public interests are threatened and jeopardized by any corporation, especially one of a public nature like a railroad company, seeking to transcend its powers, and to violate the public policy of the state."

See also *Louisville and Nashville R. Co. v. Commonwealth*, 97 Ky. 675, 695.

In *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, 363, it was held by the supreme court of Massachusetts that an information in equity in the name of the attorney general will lie against a *quasi* public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are to impair public rights. The case was decided on the point that the illegal acts created a public nuisance, but the court recognizes the principle that if the threatened act would injuriously affect or endanger the public interests the action will lie, citing a number of English cases to support the proposition.

In *Attorney General v. Great Northern R. Co.*, 1 Drewry & Smale, 161, it was said by Vice Chancellor Kindersley:

"The only remaining question is this: Whether, if the interests of the public are injured or endangered by the practice complained of, it is competent for the attorney general, ex officio or on relation, to file an information to prevent it.

"On this point I entertain no doubt whatever. Whenever the interests of the public are damnified, by a company established for any particular purpose by act of Parliament, acting illegally and in contravention of the powers con-

ferred upon it, I conceive it is the function and duty of the attorney general to protect the interests of the public by an information; and that where, in the case of any injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general in cases of injury to public interests from such a cause, to file an information for an injunction. The cases in which the attorney general comes forward on behalf of the public, to ask this court to restrain a nuisance, are an illustration of this principle. A nuisance may be detrimental to the public or to an individual; and it is very usual for the attorney general to come forward for an injunction to restrain it, so far as it affects the public, just as an individual may apply for an injunction to restrain it, where it affects himself. It is true that every injury is not a nuisance; but the right of the public to be protected against injury by the information of the attorney general, is not confined to those injuries which come within the strict definition of a nuisance. Where it is the interest of the public to prevent an illegal act, such as this, being committed, it is competent for the attorney general to file an information to restrain it."

The whole subject of the power of the state to maintain an action such as this in the supreme court of a state having similar constitutional provisions to those of this state is considered in a learned and exhaustive opinion by Chief Justice Ryan—which is one of the landmarks of modern jurisprudence—in *Attorney General v. R. R. Cos.*, 35 Wis., 425, 511, and both the right of the state to maintain the action and the jurisdiction of the court to entertain it are clearly demonstrated. The subject is also discussed in *Green's Brice's Ultra Vires*, 706, where the authorities are collected.

While there are cases announcing doctrines which may not be in entire harmony with these, we believe that, if for no other reason, the marvelous development of franchised public service corporations during the present generation demands that of two opposing policies that one should be adopted which leaves the state most unfettered in its powers of regulation and control and most free in adopting speedy and adequate means of safeguarding the public interest by direct action if necessary in the court of last resort.

But it is said that, under the terms of the act, the state railway commission, and not the attorney general, has been

designated as the officer to enforce the law and that the attorney general is not authorized to maintain the suit. The petition recites, however, "Comes now the state of Nebraska, by its attorney general William T. Thompson, *by and with the consent and authority of the Nebraska state railway commission, and for cause of action, etc.*" This allegation is not denied and must be taken as true. It, therefore, appears that the action is brought by the attorney general, by the authority of the Nebraska state railway commission, the particular officers connected with the executive department of the state government, who are specially empowered by the act itself to enforce its provisions.

It may be said further that, under the provisions of the statute, specifying the power and duties of the attorney general, it is the duty of the attorney general to appear for the state and prosecute all actions in the supreme court in which the state shall be interested or a party, and he may on his own motion bring and prosecute for the state any suit, matter or thing, civil or criminal, in which the state is interested or relating to any matter connected with the executive department. Irrespective of what the powers of the attorney general might have been at common law as the law officer of the crown, under this provision, the power and the duty of determining when an action shall be brought by the state or in the interests of the state in this court devolves upon the attorney general as fully and to as great an extent as upon the governor or any other officer of the executive department. When in the exercise of the powers thus conferred upon him by the constitution and the law, the attorney general determines that the interests of the state require an action to be brought in this court, no question can arise as to his authority to institute or maintain the suit, if it is a matter in which the state is interested or relating to the executive department. If, in his judgment, there is good cause to believe that any public service corporation, the regulated and fixed charges of which for services rendered to the public under its franchise have been disregarded, or that unreasonable, extortionate and excessive charges have been made for public service it becomes his duty as a member of the executive department of the state to institute proceedings before the judicial department of the government, whereby the rights of the state, exercised in behalf of all the people, may be preserved and vindicated. This is a well recognized power and duty of such an officer both in England and in this country.

We have no hesitation, therefore, in holding that in all

civil cases in which the existence or regulation or control of a public franchise, the grant of which carries with it any exercise of a portion of the sovereign power of the state is concerned, this court has original jurisdiction at the suit of the state, or of the attorney general in behalf of the state. To hold otherwise would be to divest the state of the most efficient manner of exercise of its regulatory and supervisory powers over the instrumentalities which it has created for its own public purposes, which we cannot believe it ever was the intention of the makers of the organic law to do.

In the opinion of Mr. Commissioner Ryan, *In re Petition of Attorney General*, 40 Neb., 402, 410, it was said:

"Such jurisdiction will not be entertained by this court in cases wherein the state is but a nominal party. The case must be such that the state as a real substantial party has a direct interest in having determined."

But as has been pointed out in a number of the opinions, portions of which are quoted herein, a public wrong may consist of almost innumerable instances of private wrong and this is especially true if it is a wrong of a nature which affects the rights of the people living in almost every city, town or village in the state as well as those living upon farms and ranches. The express companies now rival the post office in the extent of their operations and possibly actually transact business for as many or more different persons in the course of a year, than the railroad companies do. We think, therefore, that in cases such as this where the people of the whole state are interested in the charges made for carriage upon public highways by common carriers, the state has a real and substantial interest and the jurisdiction of this court is undoubted.

The objection that the petition does not show whether the defendant is a person, association or corporation probably should have been made by motion to make more specific. At all events, we think it is too late in the progress of this case to raise it now.

As to the contention that the suit was prematurely brought, sections 2 and 3 of the act are as follows:

"Sec. 2. (Schedules of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission, a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D., 1907."

"Sec. 3. (Rates.) Express companies may charge and

receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate.

The defendant's contention is that the direction that an express company shall file a schedule of the rates in force January 1, 1907, "within thirty days after the passage and approval of this act," must be construed as meaning within thirty days after the act became a law, and that the act became a law on July 5; that the legislature intended the companies to have thirty days within which to prepare schedules, after the law became effective, and that the rates provided for did not go into effect until thirty days after the filing of the schedules. It is our view that the legislature intended to adopt and did adopt the rates and classifications charged for the transportation of money or merchandise on the 1st day of January, 1907, as a basis or standard of comparison for the new rates and that under the provisions of section 3, of the act, it became unlawful, after the act took effect, for an express company to charge or receive for its services in this state, any greater sum than seventy-five per cent of the rate in force upon January 1, 1907.

It cannot be reasonably contended that it was the intention of the legislature that the rates set forth in the written schedule filed should be taken as the basis or as anything more than evidence of the rate which was actually charged on January 1. If, by mistake, the schedule filed showed a rate other than that actually charged, it would be unreasonable to say that a rate "as shown by the schedule" should be taken as the basis, as a narrow and literal reading of the act would require, and not the rate which was actually charged and in force on the 1st day of January, 1907.

We are of the opinion that the true interpretation of the meaning of the act is that a rate not exceeding seventy-five per cent of the rates charged on the 1st day of January, 1907, became the lawful rate as soon as the act took effect, but that thirty days thereafter were allowed the express companies to file with the railway commission a complete schedule of the rates and classifications in force on January 1, 1907. To so interpret the act places no harsh or unreasonable burden upon the express companies by way of requiring new schedules and classifications to be made within such a short period of time as to necessitate undue haste in preparation, or such as to require the employment of extra assistance before the rates could easily be ascertained, since the

only process necessary for their agents to perform in order to ascertain the lawful rate after the act took effect was to deduct twenty-five per cent from the rates in force upon January 1, 1907. But, recognizing the difficulty and the necessary time required to prepare new written or printed schedules of rates and classifications of the multifarious articles of merchandise carried by express, the legislature wisely provided the space of thirty days in which to prepare and file such schedules before a penalty for noncompliance with this direction should be imposed.

As soon as the act became operative, the rates prescribed took effect, but the time to file the schedules extended for thirty days thereafter. The action, therefore, was not prematurely brought.

We conclude, therefore, that the attorney general had authority to bring the suit in the name of the state; that this court has jurisdiction and that the action was not premature.

The plea in abatement is, therefore, overruled.

This is an authoritative holding by the supreme court of Nebraska, that the state of Nebraska is the real plaintiff in a suit to enjoin a common carrier from exacting for *intra*state services in Nebraska excessive charges in violation of statutory rates; that such a suit may be maintained though the state has no pecuniary interest in the suit; that the conduct of a common carrier in charging unlawful and excessive rates is a public wrong; that the Nebraska supreme court has original jurisdiction of such a case; and that equity is the proper remedy. These rulings resolve against defendants in the case at bar every contention urged by them to justify their refusal to remand to the state court the case of the state of Nebraska against the Chicago, Burlington & Quincy Railroad Company. In the *Express Company Case* the state alone was plaintiff, and the suit could not have been maintained, if the attorney general and railway commission were real or necessary parties.

The rulings stated were made by the state court of last resort in construing and applying provisions of the Nebraska constitution and statutes. They do not conflict

with any provision of the federal constitution, act of congress or treaty of the United States, and are, therefore, binding on the federal courts. (*Sheppard v. Graves*, 14 How., 504; *Olson v. Smith*, 25 Sup. Ct. Rep. 52; *Knight Templars v. Jarman*, 187 U. S., 197; *Santa Cruz Co. v. Santa Cruz R. Co.*, 111 U. S., 362; *Glenn v. Garch*, 147 U. S., 369.) Moreover, the decision of the supreme court of Nebraska is in harmony with the ruling of this court as announced by Mr. Justice Brewer in *In re Debs*, 158 U. S., 584, a case cited by the Nebraska court to sustain its conclusions.

The state of Nebraska, being the only real and necessary party plaintiff in the suit which the circuit court refused to remand, is not a citizen within the removal acts of congress (*Stone v. South Carolina*, 117 U. S., 430; *Postal Telegraph Co. v. Alabama*, 155 U. S. 482; *State of Arkansas v. Kansas & Texas Coal Co.*, 183, U. S., 185), and the circuit court acquired no jurisdiction by removal.

The presence of the attorney general and the railway commissioners on the face of the petition as co-plaintiffs, does not change the result. A single injunction was sought in favor of the state against a single defendant, and no question of a severable controversy arose or existed. The state as the real plaintiff prevented removal and defeated the jurisdiction of the circuit court.

The rule of this court now is that it will go behind the title and find the real plaintiff by an examination of the petition. (*In re Ayers*, 123 U. S., 443.) On such an examination it is shown on the face of the record that the executive officers are mere nominal parties seeking relief for their sovereign whom they in truth represent. An agent or attorney, or other representative of a substantial plaintiff who has no interest in the controversy but who is formally joined as a co-plaintiff, solely for the purpose of securing the rights of the substantial plaintiff, is only a nominal party with respect to federal jurisdiction. (*Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed., 577; *Wood v.*

*Davis*, 18 How., 467; *Kerr v. Watts*, 6 Wheat, 550; *New Chester Water Co. v. Holly Mfg. Co.*, 3 C. C. A., 399.)

Defendants also seek to justify their refusal to remand the case on the ground that the petition in the state court fails to show an interest entitling the state, as a party, to relief in equity.

The substance of the statutes fixing rates, forbidding discriminations and issuance of passes, and creating a railway commission and defining its power and duties, is set out in the petition. Violation, or threatened violation, of these statutes is also alleged and this shows an injury to the people generally within the meaning of the rule announced by the supreme court of Nebraska in the opinion hereinbefore reproduced, to the effect that the exaction of excessive charges by a common carrier in violation of law is a public wrong. In addition it is stated in the petition in the state court:

"All of said unlawful acts and threatened acts are contrary to equity and good conscience and *to the manifest injury of the plaintiffs in the premises and to the people of the state of Nebraska;* that the wrongs and threatened acts of defendant are irreparable and plaintiffs are without adequate remedy except in a court of equity."

Under the Nebraska Code these allegations are sufficient to give the state court jurisdiction and to show the effort of the state to promote the public welfare and prevent a public wrong. If, however, any essential averment was omitted, the right of amendment existed by statute.

To justify the holdings of the circuit court that the officers are the only real parties, that the state is not a necessary party and has no interest in the controversy, and that the state of Nebraska must keep out of its courts of equity except when its pecuniary interests are involved, the case of *Missouri K. & T. R. Co. v. Missouri Railway & Warehouse Com.*, 183 U. S., 53, is cited. That case has no application to the case at bar. This is shown by the following reasons given in the state's original brief:

"It is respectfully urged that for many reasons the

doctrine announced in the *Missouri Case* has no application to the questions presented by this petition or by the state's motion to remand, and is no justification for the circuit court in assuming jurisdiction. That case was brought in the name of the Missouri Railroad and Warehouse Commissioners in a Missouri court to enforce the plaintiffs' order forbidding excessive and illegal rates for local travel over the Boonville bridge across the Missouri river. Some of the reasons why that case is not a precedent here are as follows:

"1. Neither the report in the *Missouri Case*, in 183 U. S. 53, nor the report of the same case in the supreme court of Missouri in 151 Mo., 644, shows that the case was brought in a Missouri court having jurisdiction of civil cases in which the state is a party, by virtue of a constitutional provision construed by the highest judicial tribunal in the state to include cases in which the state has a governmental as well as a pecuniary interest.

"2. In the Missouri court the state was not a party plaintiff, and the Missouri Railroad and Warehouse Commissioners, as plaintiffs, made no pretense in their petition of exercising sovereignty on behalf of the state of Missouri or of suing for the benefit of the state of Missouri. The petition is set out in full in 151 Mo., 648, 650, and contains no allegation that disobedience of the order of the commissioners resulted in irreparable injury to the public or that the sovereign had any interest in the suit either pecuniary or governmental.

"3. In the Missouri court there was an attempt to retain jurisdiction by showing a pecuniary interest on part of the state by reason of its liability for costs in the event of an adverse decision, and by the hope of recovering penalties in case of a victory.

"4. Under the statutes of Missouri a private person could maintain a suit to enforce the commission's orders if interested therein, and the commissioners in bringing suit for such a purpose possessed no greater degree of sovereignty than a private individual. They acted for shippers and not for the state. The petition, therefore, did not disclose a sovereign seeking an injunction to promote the general welfare by preventing injury to the public.

"5. The right of a sovereign to apply to its own courts for any proper assistance to prevent wrongdoing from resulting in injury to the general welfare was not presented by counsel in the *Missouri Case*.

"In the foregoing particulars there is irreconcilable conflict between the *Missouri Case* and the facts and questions presented by this application for mandamus, but if from any possible standpoint the *Missouri Case* can be cited as a precedent for the doctrine that the state of Nebraska cannot maintain in its own name in the supreme court of Nebraska, a suit to enjoin the Chicago, Burlington & Quincy Railroad Company from injuring the public by extortion, discrimination and defiance of constituted authority in direct violation of statute, unless its pecuniary interests are involved, then the *Missouri Case* is at variance with *In re Debs*, 158 U. S., 584."

It has already been shown that the state of Nebraska is the real and only necessary plaintiff in the state court; but if the contrary were true, the federal court could acquire no jurisdiction for the reason that the state supreme court, under section 2, article 6, of the Nebraska constitution, could only acquire original jurisdiction by reason of the state's being a party, and if there was no jurisdiction before removal because the state was not a party there could be none afterward. (*Auracher v. Omaha & St. L. R. Co.*, 102 Fed., 1; *Swift v. Philadelphia & R. Co.*, 58 Fed., 558; *East Tennessee V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S., 306.)

It follows there is no possible defense to petitioner's application for mandamus and it is earnestly insisted that the writ should issue commanding the district judges to remand to the supreme court of Nebraska the case wherein the State of Nebraska is plaintiff and the Chicago, Burlington & Quincy Railroad Company is defendant, to the end that the state court may exercise its rightful and exclusive jurisdiction to promote the general welfare of the people of Nebraska, and to prevent extortion by *intra*state carriers.

Respectfully submitted,

WILLIAM T. THOMPSON,
*Attorney General.*

WILLIAM B. ROSE,
*Deputy Attorney General.*
Counsel for the State of Nebraska.

Lincoln, Neb., March 10, 1908.

Office Supreme Court, U. S.
FILED.
JAN 6 1908
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1907.**

---

## No. 15, Original.

---

*EX PARTE:* IN THE MATTER OF THE STATE OF NEBRASKA, PETITIONER.

---

**RETURN TO RULE.**

---

WILLIAM D. MCHUGH,
*Counsel for Respondents.*

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 29344

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 15, Original.

*EX PARTE:* IN THE MATTER OF THE STATE OF NEBRASKA, PETITIONER.

### RETURN TO RULE.

Now come William H. Munger and Thomas C. Munger, United States District Judges for the District of Nebraska, holding the Circuit Court of the United States in and for the District of Nebraska, and for return to the order of this court heretofore, to wit, on the twenty-third of December, 1907, entered herein, and for cause why the petition of the petitioner herein should not be granted, respectfully show to the court as follows:

That they are United States District Judges for the District of Nebraska, and as such hold the Circuit Court of the United States in and for the District of Nebraska.

That on the third of July, 1907, a duly authenticated transcript of the record in the Supreme Court of the State of Nebraska in that certain cause begun in said court, in which the State of Nebraska, William T. Thompson, Attorney General; Nebraska State Railway Commission, Hudson J. Winnett, J. A. Williams, Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State

of Nebraska, were plaintiffs and Chicago, Burlington & Quincy Railroad Company was defendant, was duly filed and entered in the Circuit Court of the United States for the District of Nebraska aforesaid, Lincoln Division; and said cause was thereupon duly docketed and entered in said circuit court, all of which will more fully appear from the duly authenticated transcript of the record of said circuit court in said cause, hereto attached and made a part hereof, to which reference is hereby made.

That thereafter, on July 12, 1907, the plaintiffs in said action filed their motion to remand the said cause to the Supreme Court of the State of Nebraska for the reasons set out in said motion, all of which will more fully appear from the transcript of the record of said court in said cause, attached hereto and made a part hereof, to which reference is hereby made.

That thereafter the said motion to remand said cause came duly and regularly on to be heard in said circuit court before these respondents, holding said court, and thereupon it became and was the duty of these respondents, as judges aforesaid holding said court, to hear the argument of respective counsel on said motion, to consider the same, and to decide the said motion; and these respondents did thereupon hear the arguments of the counsel for the respective parties upon said motion, and did duly consider the same, and did, after full consideration, decide the same, and did overrule the said motion, and did duly enter an order overruling the said motion, the said plaintiffs in said action excepting thereto, and respondents did duly enter the said order and said exceptions, all of which will more fully appear from the duly authenticated transcript of the record of said court in said cause, hereto attached and made a part hereof, to which reference is hereby made.

That these respondents did overrule the said motion to remand said cause in the exercise of the jurisdiction conferred upon them by law, and that the said decision upon

said motion was the exercise of the judgment of these respondents, holding the said court as aforesaid, and the said motion was overruled by these respondents for the reasons expressed in their opinion filed with the said order; which said opinion is fully set forth in the duly authenticated transcript of the record of said circuit court in said cause, hereto attached and made a part hereof, to which reference is hereby made.

Wherefore these respondents, having fully and sufficiently made return to the said order of this court herein, pray that the said order and rule be discharged and that the petition herein be dismissed.

WM. H. MUNGER,
THOMAS C. MUNGER,
*United States District Judges for the District of Nebraska, Holding the Circuit Court of the United States in and for the District of Nebraska.*

WILLIAM D. MCHUGH,
*Counsel for Respondents.*

UNITED STATES OF AMERICA,
*State and District of Nebraska, County of Douglas, ss:*

William H. Munger and Thomas C. Munger, being each duly sworn according to law, do each severally on oath say that the facts stated in the above and foregoing return are true.

WM. H. MUNGER.
THOMAS C. MUNGER.

Subscribed in my presence and sworn to before me this 1st day of January, 1908.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL, *Clerk.*

## EXHIBIT TO RETURN.

TRANSCRIPT OF RECORD FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA IN THE CASE OF THE STATE OF NEBRASKA ET AL. VS. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, REMOVED FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

# No. 17. Docket "A."

THE STATE OF NEBRASKA ET AL.

*vs.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

INDEX.


| | Original. | Print. |
|---|---|---|
| Transcript from supreme court of State of Nebraska | 1 | 1 |
| Petition for injunction | 2 | 2 |
| Præcipe for summons | 10 | 6 |
| Summons | 11 | 6 |
| Return to summons | 12 | 7 |
| Petition for removal | 13 | 7 |
| Bond for removal | 17 | 9 |
| Certificate of clerk | 20 | 11 |
| Answer of C., B. & Q. Ry. Company | 21 | 11 |
| Motion to remand | 30 | 17 |
| Order: Motion to remand argued and submitted | 31 | 17 |
| Memorandum opinion | 32 | 18 |
| Order: Motion to remand overruled | 42 | 23 |
| Certificate of clerk | 43 | 24 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 8, 1908.

1 Pleas before the Honorable William H. Munger and Honorable Thomas C. Munger, Judges of the District Court of the United States for the District of Nebraska, sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the May, 1907, Term of the Lincoln Division of said Court.

Be it remembered, that on the 3rd day of July, 1907, transcript from the Supreme Court of the State of Nebraska was filed in the Clerk's office of the Circuit Court; said Transcript is in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

15266.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*v.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the City of Lincoln, in said State, on the 1st day of January, A. D. 1907.

Present: Hon. Samuel H. Sedgwick, Chief Justice. Hon. John B. Barnes, Judge. Hon. Charles B. Letton, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

2 Be it remembered, that on the 15th day of June, A. D. 1907, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Injunction in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*vs.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

*Petition for Injunction.*

Now come plaintiffs, and for cause of action against the defendant, allege:

First Cause of Action.

1. William T. Thompson, Plaintiff is the duly elected, qualified and acting attorney general of the State of Nebraska, and it is his duty as such attorney general to bring and prosecute all suits necessary to the proper enforcement of all lawful intra-state rates and charges for the transportation of freight and passengers over and upon the various lines of railway companies and common carriers operating in the State of Nebraska.

Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., are the duly elected, qualified and acting railway commissioners of the State of Nebraska, and they are and constitute the Nebraska State Railway Commission, and it is their duty as such under the laws of the State of Nebraska to determine, regulate and enforce proper and lawful intra-state rates and charges for the transportation of freight over and upon the railroad lines of all railway
3 companies and common carriers operating in the State of Nebraska, and to enforce therein on such railroads and common carriers all lawful intra-state rates and charges for the transportation of passengers in said state, and to prevent discrimination in such intra-state freight and passenger rates and charges.

Defendant, Chicago, Burlington & Quincy Railway Company is a corporation, organized and existing under and by virtue of the laws of the State of Iowa, and is a common carrier of freight and passengers in the State of Nebraska, and is operating lines of railway therein.

By an act of the legislature of the State of Nebraska passed at the thirtieth session in 1907, known as House Roll No. 267, being "an act to amend sections 1058 and 1059 of Cobbey's Annotated Statutes for the year 1903, to fix a maximum passenger rate and to repeal said sections," which by virtue of an emergency clause went into effect and became a law March 6, 1907, it was made unlawful for any railroad corporation operating in the State of Nebraska to charge, collect, demand or receive for the intra-state transportation of any passenger over twelve years of age, with baggage not exceed-

ing 200 pounds in weight, on any train of its line of road in the State of Nebraska, a sum exceeding two cents per mile, except that no railroad company shall be required to sell any ticket for less than five cents.

Notwithstanding the requirements of said statute limiting the lawful fare or charge of railroad companies to two cents per mile for each passenger and the duty of defendant to comply with the provisions of said law, defendant threatens to, and will, unless restrained by this court, put in force in the State of Nebraska an unlawful rate for the intra-state transportation of passengers
4 in excess of two cents per mile.

2. For another and second cause of action against defendant aforesaid, plaintiffs further allege that by an act of the legislature of the state of Nebraska, passed at the thirtieth session thereof, in 1907, known as Senate File No. 325, entitled "An Act to fix the maximum rates to be charged for the transportation of certain property within the state of Nebraska upon and over the lines of railway companies or common carriers within this State and to delegate powers to the State Railway Commission to regulate the same and to provide penalties for the violation of this act and to repeal article 12 of chapter 72 of the Compiled Statutes of Nebraska, for the year 1905," it was made unlawful for any railroad company or common carrier operating or doing business in the State of Nebraska to charge, collect or receive for the transportation of live stock, potatoes and grain, grain products, fruit, coal, lumber, or building materials in car load lots within the State of Nebraska, more than 85% of the fixed amount in the classification or schedule of said railroad company or common carrier for transportation of property in force and effect on their various lines of railway January 1, 1907, until after the said railway commission shall have provided a greater rate upon any article or property in such schedules from the rate fixed by Senate File No. 325, which was approved April 8, 1907, and which said act will become a law and go into effect July 5, 1907.

Notwithstanding the requirements of such Senate File No. 325, making it unlawful for any railroad company or any common carrier within the State of Nebraska to charge, collect, or receive for the intra-state transportation of live stock, potatoes, grain, grain products, fruit, coal, lumber, or building materials in car
5 load lots within the State of Nebraska more than 85% of the fixed amount in the classifications and schedules of freight charges in force January 1, 1907, and that said reduction in rates will become effective July 5, 1907, and notwithstanding the duty of defendant to comply with the requirements of said act when it goes into effect and to prepare schedules and furnish and equip its agents with the same to enable them to meet the requirements of said law, defendant threatens thereafter to put in force in the State of Nebraska unlawful intra-state rates in excess of the rates limited by said Senate File No. 325, and threatens to disregard the provisions of said Senate File No. 325, and is neglecting to prepare its schedules in conformity therewith and is threatening to put in force after

July 5, 1907, rates in excess of those lawfully fixed by said Senate File No. 325, and before the said Nebraska State Railway Commission shall have had time and an opportunity to exercise its power to hear and determine whether or not the freight rate upon any article so reduced is either so high as to be unjust to shippers or so low as to be unremunerative or unjust to defendant, and to make such order in the permises as is demanded by the facts.

3. For a further and third cause of action plaintiffs allege that the defendant aforesaid, in violation of law, has issued and is at the present time issuing and is threatening to issue and give to persons, through its officers and agents, and will continue to give and issue, unless restrained and enjoined by this court free transportation, free passes, and free tickets over the lines of its said road in the State of Nebraska, which persons to whom said free tickets, free passes and free transportation have been given, are being given, and are
6 threatened to be given, are not officers, agents and *bona fide* employees of said company, the major portion of whose time is devoted to the service of the company, children under seven years of age, officials and linemen of telegraph companies, ex-employees, retired from service on account of age, or because of disability sustained while in the service of said railroad company, and dependent members of their immediate families; widows or dependent children of employees killed while in the service of such railroad company; necessary care-takers of live stock, poultry, vegetables and fruit; employees of sleeping car companies and express companies; railway mail service employees; newsboys on trains; baggage agents; persons injured in wrecks; physicians and nurses attending the same; officers, agents, employees and dependent members of their families of other railroad companies exchanging transportation, or to persons with the object or providing relief in cases of general epidemic, pestilence or calamitous visitation, in violation of law; and plaintiffs further allege that defendant in violation of law has issued and is now issuing and threatens to issue intra-state passes, mileage, tickets and transportation which give to the recipients thereof an unfair and unlawful advantage over others and thus discriminate in favor of some passengers and against others and under false and fraudulent pretext attempt to evade and cheat the laws of the State of Nebraska.

4. For a further and fourth cause of action, the plaintiffs allege that defendant, in violation of law, has defied the lawful orders of the said Nebraska State Railway Commission and has denied its authority to regulate intra-state freight and passenger rates on its lines of railway in the State of Nebraska and has denied the
7 authority of said Nebraska State Railway Commission to make and enforce its orders, and by concealment has attempted to evade the laws of Nebraska, and the orders of said Nebraska State Railway Commission and has refused to disclose the true condition of its business and the facts demanded by the Nebraska State Railway Commission, and has concealed from the said Nebraska State Railway Commission and the people of the state of

Nebraska the true condition of its affairs as a common carrier of freight and passengers in the State of Nebraska.

All of said unlawful acts and threatened acts are contrary to equity and good conscience and to the manifest injury of the plaintiffs in the premises and to the people of the state of Nebraska, that the wrongs and threatened acts of defendant are irreparable and plaintiffs are without adequate remedy except in a court of equity:

Wherefore, plaintiffs pray that the defendant, its officers, agents, attorneys, servants and employees be enjoined from making or putting into effect any other or different intra-state rate or charge for the transportation of passengers over its line or lines of railroad in the state of Nebraska than two cents per mile for each passenger, and that it be restrained from interfering with or changing the rate established by law.

2. That defendant, its attorneys, agents, servants, and employees be restrained and enjoined from putting into effect, charging or receiving, after July 5, 1907, for the intra-state transportation of live stock, potatoes, and grain, grain products, fruit, coal, lumber or building materials in car load lots within the state of Nebraska, more than 85% of the rates charged and in force on its various lines of railway within the state of Nebraska January 1, 1907,
8 until after the said Nebraska State Railway Commission shall have provided a greater rate upon any article or property than that fixed by said Senate File No. 325.

3. That defendant, its attorneys, agents, servants and employees be restrained and enjoined from disobeying the lawful orders of said Nebraska State Railway Commission heretofore made and from concealing from said Nebraska State Railway Commission the true condition of its business in intra-state transportation of passengers and freight on its several lines of railroad in the state of Nebraska.

4. That defendant, its attorneys, agents, servants and employees, be restrained and enjoined from making any unlawful discrimination in issuing intra-state passes, mileage, tickets and transportation over its lines of railroad in the state of Nebraska, and that plaintiffs may be granted such other and further relief as equity and good conscience may require.

STATE OF NEBRASKA,
WILLIAM T. THOMPSON,
HUDSON J. WINNETT,
J. A. WILLIAMS,
HENRY T. CLARKE, JR.,
By W. T. THOMPSON,
*Attorney General.*
W. B. ROSE, *Deputy.*
G. G. MARTIN, *Assistant.*

STATE OF NEBRASKA, *Lancaster County, ss:*

William T. Thompson being first duly sworn, deposes and says that he is the duly elected, qualified and acting attorney general for the State of Nebraska and one of the plaintiffs in the above entitled

cause; that he knows the facts stated in the above and foregoing petition, and says that the same are true as he verily believes.

WILLIAM T. THOMPSON.

9 Subscribed in my presence and sworn to before me this 15th day of June, A. D. 1907.

[SEAL.] H. C. LINDSAY,
*Clerk Supreme Court.*

Endorsed: 15266. State *v.* C. B. & Q. Ry. Co. Petition. Supreme Court Nebraska. Filed Jun- 15, 1907. H. C. Lindsay, Clerk.

10 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Præcipe in the words and figures following, to-wit:

To Hon. H. C. Lindsay, Clerk Supreme Court:

Please issue summons in this case for defendant, as required by law.

WM. T. THOMPSON,
*Att'y Gen.*

June 15, 1907.

Endorsed: Supreme Court of Nebraska. Filed Jun- 15, 1907, H. C. Lindsay, Clerk.

11 And on the same day there was made to issue out of the office of the Clerk of said Supreme Court a certain Summons in the words and figures following, to-wit:

*Summons, Supreme Court.*

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Lancaster, Greeting:

You are hereby commanded to notify Chicago, Burlington & Quincy Railway Company, Defendant, that it has been sued by The State of Nebraska, William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett; J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs, in the Supreme Court of the State of Nebraska, and that unless it answer by the fifteenth day of July, A. D. 1907, the petition of said Plaintiffs, filed against it in the Clerk's office of said Supreme Court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this Summons on or before the twenty-fourth day of June, A. D. 1907.

Witness my hand and the seal of said Court this fifteen- day of June, A. D. 1907.

[SEAL.] H. C. LINDSAY, *Clerk.*

Endorsed: 15266. Supreme Court. State of Nebraska. State of Nebraska, *et al.* Plaintiffs, *v.* Chicago, Burlington and Quincy Railway Company, Defendant. Summons.

12 And afterward, to-wit: On the 22nd day of June, said Summons theretofore issued was returned and filed in the office of the Clerk of said Supreme Court with service endorsed thereon in the words and figures following, to-wit:

STATE OF NEBRASKA, *Lancaster County, ss:*

I hereby certify that on the 15th day of June, 1907, I served the within Writ of Summons on the within named Chicago, Burlington & Quincy Railway Company by George W. Bonnell, as City Passenger & Ticket Agent of Chicago, Burlington and Quincy Railway Company by delivering to him a true and certified copy hereof with all endorsements thereon.

NICHOLAS RESS, *Sheriff.*

Endorsed: Supreme Court of Nebraska. Filed Jun- 22, 1907. H. C. Lindsay, Clerk.

13 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Petition for Removal to the Circuit Court of the United States for the District of Nebraska, Lincoln Division, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*v.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

*Petition for Removal to the Circuit Court of the United States for the District of Nebraska, Lincoln Division.*

To the Honorable the Judges of the Supreme Court of the State of Nebraska:

Your petitioner, Chicago, Burlington & Quincy Railway Company, most respectfully shows that it is the defendant in the above entitled action; that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars;

that the said suit is of a civil nature and is an action brought by the plaintiffs against your petitioner.

Your petitioner further avers that in the above entitled suit there is a controversy which is wholly between citizens of different states, to-wit: a controversy between your petitioner, Chicago, Burlington & Quincy Railway Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been and now is a corporation created and existing under and by virtue of the laws of the State of Iowa; the said William T. Thompson,
14 Attorney General of the State of Nebraska, one of the plaintiffs, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska; the Nebraska State Railway Commission, a board organized under the laws of the State of Nebraska for the supervision of railways in said State, and the members composing the said Board, whom your petitioner avers were, at the time of the commencement of this suit, ever since have been and still are citizens and residents of the state of Nebraska; the said Hudson J. Winnett, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska; the said J. A. Williams, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska, and the said Henry T. Clarke, Jr., one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska. And your petitioner avers that it was not at the time of the commencement of this suit, nor since has been and is not now a resident or citizen of the state of Nebraska.

Your petitioner further avers that the State of Nebraska, as a party plaintiff in the said suit, is not a proper or necessary party in the said suit; that the said State of Nebraska is not the real party in interest in the said suit; that the said State of Nebraska has
15 no interest, beneficial or otherwise, in the said suit, and has been named as a party plaintiff simply for the purpose of depriving the Circuit Court of the United States of jurisdiction over this suit.

Your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said Circuit Court of the United States for the District of Nebraska, Lincoln Division, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court if the said Court should hold that this suit was wrongfully or improperly brought thereto, and it prays this Court to proceed no further herein, except to make an order for removal and to accept the said surety and bond and to cause the record herein to be removed in the said

Circuit Court of the United States within and for the District of Nebraska, Lincoln Division.

CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,
By CHARLES F. MANDERSON,
CHARLES J. GREENE,
FRANK E. BISHOP, AND
RALPH W. BRECKENRIDGE,
*Its Attorneys.*

STATE OF NEBRASKA, *County of Lancaster, ss:*

Ralph W. Breckenridge being first duly sworn on his oath deposes and says that he is one of the attorneys for the defendant, Chicago, Burlington & Quincy Railway Company, in the above entitled cause; that he has read the foregoing petition, knows the contents thereof and that the statements therein contained are true as he verily believes.

RALPH BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 21st day of June, 1907.

[SEAL.] VICTOR SEYMOUR,
*Notary Public.*

My commission expires May 7, 1909.

16 Endorsed: The State of Nebraska, *et al.*, Plaintiffs, *v.* Chicago, Burlington & Quincy Railway Company, Defendant. Petition for Removal to U. S. Circuit Court. Supreme Court of Nebraska, Filed Jun- 22, 1907, H. C. Lindsay, Clerk.

17 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*vs.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

*Bond for Removal to the Circuit Court of the United States for the District of Nebraska, Lincoln Division.*

Know all men by these presents:

That Chicago, Burlington & Quincy Railway Company, as principal, and H. S. Freeman, as surety, are held and firmly bound unto

the State of Nebraska, Wm. T. Thompson, Attorney General; Nebraska State Railway Commisison; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska, in the penal sum of $500.00 for the payment whereof, well and truly to be made to the aforesaid State of Nebraska, Wm. T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, their heirs and assigns, we bind ourselves, our heirs, executors and administrators, representatives, successors and assigns, jointly and severally, firmly by these presents.

18 Yet upon these conditions; That said Chicago, Burlington & Quincy Railway Company, having petitioned the Supreme Court of the State of Nebraska for the removal of a certain cause therein pending wherein said State of Nebraska; Wm. T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission, are the plaintiffs and the said Chicago, Burlington & Quincy Railway Company is defendant, to the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

Now, if the said Chicago, Burlington & Quincy Railway Company shall enter in said Circuit Court of the United States for the District of Nebraska, Lincoln Division, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court should hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to be and remain in full force and effect.

Witness our hands this 21st day of June, 1907.

CHICAGO, BURLINGTON & QUINCY RAILWAY CO.,
By FRANK E. BISHOP AND
R. W. BRECKENRIDGE,
*Its Attorneys, Principal.*
H. S. FREEMAN, *Surety.*

STATE OF NEBRASKA, *County of Lancaster, ss:*

H. S. Freeman, the surety named in the foregoing bond, being duly sworn, deposes and says that he is a resident of the
19 County of Lancaster, State of Nebraska, and a property holder therein; that he is worth the sum of One Thousand Dollars over and above all his debts and liabilities, and exclusive of property by law exempt from levy and sale on execution.

H. S. FREEMAN.

Subscribed in my presence and sworn to before me this 21st day of June, 1907.

[SEAL.]

P. R. EASTERDAY,
*Notary Public.*

The within bond and the above named surety are hereby approved this 22nd day of June, 1907.

S. H. SEDGWICK,
*Chief Justice.*

Endorsed: 15266. State *et al. v.* C. B. & Q. Ry. Co., Bond, for removal. Supreme Court of Nebraska. Filed Jun- 22, 1907. H. C. Lindsay, Clerk.

20 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the above and foregoing is a true copy of all papers filed and proceedings had and entered in the case of The State of Nebraska, William T. Thompson, Attorney General; Nebraska State Railway Commission, Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiff, *vs.* Chicago, Burlington & Quincy Railway Company, Defendant No. 5266, as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court at Lincoln, this 22nd day of June, A. D. 1907.

[SEAL.]

H. C. LINDSAY,
*Clerk of the Supreme Court of Nebraska,*
By VICTOR SEYMOUR, *Deputy.*

Fees, $5.30.

Endorsed: Filed Jul- 3, 1907, Geo. H. Thummel, Clerk, By F. A. Harrison, Deputy.

21 Thereupon afterwards, to-wit:—On the 3rd day of July, 1907, Answer of Defendant, Chicago, Burlington and Quincy Railway Company was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

THE STATE OF NEBRASKA; W. T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission, Plaintiffs,

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Defendant.

*Answer of Defendant, Chicago, Burlington and Quincy Railway Company.*

I.

This defendant now, and at all times hereafter, saving and reserving unto itself all and all manner of benefit and advantage of

exception which may be had or taken to the many errors and uncertainties and other imperfections in the said complainant's bill of complaint contained, for an answer thereto, or to so much thereof as this defendant is advised is or are material or necessary for it to make answer to, says:

II.

Admits that Hudson J. Winnett and J. A. Williams are severally duly elected, qualified and acting Members of the Board of Railway Commissioners of the State of Nebraska, but avers that Henry T. Clarke, Jr., was not elected a Member of said Board, but that
22 while a member of the Legislature of the State of Nebraska, of the Thirtieth Session thereof, begun and held at Lincoln, Nebraska, on the 1st day of January, A. D. 1907, and to which he had been previously duly elected, and for which he qualified, and before the final adjournment thereof he was, by the Chief Executive of Nebraska, appointed to fill a vacancy in said Board consequent upon the resignation of one Robert Cowell, who had been theretofore duly elected a member of said Board, and who afterwards qualified as such; this defendant therefore admits that since the date of his said appointment the said Henry T. Clarke, Jr., has been, and now is, acting as a Member of the said Nebraska State Railway Commission.

III.

Admits that under the provisions of an Act of the Legislature of the State of Nebraska, entitled: "An Act creating and defining the powers, duties and qualifications of the State Railway Commission and Secretary thereof, and fixing their compensation; defining railway companies and common carriers, regulating the same, and providing the method of fixing, establishing, publishing rates, charges and classifications for the transportation of passengers, freights and cars, including joint through rates and joint traffic arrangements, over and upon the various lines of said railway companies and common carriers in this state; to provide for a system of annual reports by common carriers; the method of making, establishing and enforcing the general orders of said Commission; defining unjust discriminations; to provide penalties for the violation of the provisions of this act, and to repeal all acts or parts of acts in conflict herewith, and to declare that an emergency exists," approved March 27th, 1907, it is the duty of the Nebraska
23 State Railway Commission to regulate and enforce proper and lawful intra-state rates and charges for the transportation of freight over the lines of all railroads and common carriers in the State of Nebraska, and to enforce on such railroads and common carriers all lawful intra-state rates and charges for the transportation of passengers and freight in the State of Nebraska, and to prevent discriminations in such intra-state freight and passenger rates and charges as alleged in paragraph numbered 2 of the first cause of action, as set forth in the petition of the said plaintiffs.

IV.

Admits that it is a corporation organized and existing under and by virtue of the laws of the State of Iowa, and that it has been, and is, authorized to acquire and operate, and operates, railroads in the State of Nebraska under and by virtue of the laws thereof.

This defendant also says that it owns and operates lines of railroad which have their eastern initial point in Chicago, Illinois, and run thence Northwest, West and Southwest through the States of Illinois, Iowa, Minnesota, Kansas, Nebraska, Colorado, Wisconsin, South Dakota, Montana and Wyoming; that said Company now is, and for many years last past has been, engaged in the business of a common carrier of freight and passengers between the states mentioned and in other states.

V.

Admits that the Legislature of the State of Nebraska, at the Thirtieth Session thereof, begun and held in Lincoln, Nebraska, in January, 1907, passed, and the Chief Executive of the State of Nebraska approved, an Act known as House Roll Number 267, entitled: "An Act to amend Sections 10058 and 10059 of
24 Cobbey's Annotated Statutes for the year 1903; to fix a maximum passenger rate, and to repeal said Sections," which said Act, by virtue of an emergency clause, annexed thereto, and forming a part thereof, went into effect on March 6th, 1907; and this defendant admits that by the provisions thereof it was, and is, made unlawful for any railroad company operating any railroad in the State of Nebraska, to charge, collect, demand or receive, for the intra-state transportation of any passenger over twelve years of age, with baggage not exceeding Two Hundred pounds in weight, on any train on the line of its road in the State of Nebraska, a sum exceeding two cents per mile, except that no railroad shall or is required thereby to sell any ticket for less than five cents, as alleged in paragraph 4 of the first cause of action set forth in the plaintiff's petition or bill.

VI.

Further answering, this defendant expressly denies that it will, or that it has threatened to, or now threatens, unless restrained by the Court, to put in force in the State of Nebraska an unlawful rate for the intra-state transportation of passengers in excess of two cents per mile, as alleged in the 5th paragraph of the first cause of action of the plaintiffs' petition or bill, but avers, and states the fact to be, that this defendant, immediately the said law became effective, at once conformed with the requirements and commands thereof, and put into effect and charged and has ever since kept in effect and charged and collected, the rates provided by said House Roll Number 267.

VII.

Admits that the Legislature of Nebraska, at the Thirtieth Session thereof, begun and held in 1907, passed an Act known as Senate

File Number 325, entitled "An Act to fix the maximum rates
25 to be charged for the transportation of certain property within the State of Nebraska upon and over the lines of railways or common carriers within this State, and to delegate powers to the State Railway Commission to regulate the same, and to provide penalties for the violation of this Act, and to repeal Article 12 of Chapter 72 of the Compiled Statutes of Nebraska, for the year 1905," and this defendant admits that by the provisions of said Act it was, and is, made unlawful, after the same shall have become effective, for any railroad company or common carrier, within the State of Nebraska, to collect or receive for the transportation of live stock, potatoes, grain and grain products, fruit, coal, lumber or building material, in carload lots within the State of Nebraska, more than 85% of the rates of said railroad companies or common carriers in effect on the 1st day of January, 1907, until after the Nebraska State Railway Commission shall have provided a greater rate upon any article or property named in such schedules than those prescribed by Senate File Number 325; and this defendant admits that said Act was approved April 8th, 1907, and will, under the Constitution of Nebraska, become effective July 5th, 1907.

VIII.

Further answering, this defendant denies that it has threatened, or intends to put in force on its lines in Nebraska after said 5th day of July, 1907, rates and charges in excess of those prescribed by said Senate File Number 325, and especially denies that it has at any time threatened to disregard the provisions of said law, and that it is neglecting to prepare its schedules in conformity therewith, and denies that it has threatened to put into effect after July 5th, 1907, rates in excess of those fixed by said Senate File Number 325,
26 but alleges the fact to be that it intends to, and will by or before the said 5th day of July, put into effect the rates prescribed by said Senate File Number 325.

IX.

Further answering in this behalf, this defendant alleges the fact to be that said the Nebraska State Railway Commission, although it has had time and opportunity to fully exercise the powers attempted to be conferred on it by said Senate File Number 325, has nevertheless refused, and still refuses, an opportunity to this answering defendant to hear and determine whether or not the freight rate upon any of the articles so by said Senate File reduced is either so high as to be unjust to shippers or so low as to be unremunerative or just or unjust to this defendant, or to make any order in the premises. This defendant alleges in this behalf that it has filed no formal complaint with the said Railway Commission for any relief attempted to be afforded by the provisions of said Senate File Number 325, for the reason that said State Railway Commission has informed this answering defendant that it will hear and entertain no petition for any change of the rates prescribed in said Senate File until after the said Senate File shall have become effective.

## X.

This defendant denies that in violation of law or otherwise it has issued or given or is at the present time issuing or giving, or that it threatens or intends to issue and give, to persons, through its officers and agents, or that it will continue to give and issue, unless restrained and enjoined by this Court, free transportation, free passes and free tickets over the lines of its road in the State of Nebraska,
to any person not entitled by law to receive the same, and
27 denies that it has issued or given, or that it will issue and
give, or that it has threatened to give free tickets, free passes or free transportation to persons who are not its officers, agents, and its *bona fide* employés, the major portion of whose time is devoted to its service; and this defendant denies that it has issued or given or that it has threatened or intends to issue or give, any free ticket, free pass or free transportation to any person or persons not within the classes enumerated by Section 1 of an Act of the Legislature of Nebraska, entitled: "A Bill for an Act entitled 'An Act regulating and limiting the issuance, giving, receiving and using of free tickets, free passes or free transportation to passengers over any and all the lines of railroad within the State of Nebraska; and to provide penalties for violation thereof,'" approved March 30th, 1907, and which, under the provisions of an emergency clause, became effective on the date of its approval.

And this defendant especially denies that it has, since said time, issued, or that it has issued or given, or that it now issues or gives, or that in the future it intends to issue or give, to any person or persons not entitled by law to receive the same, any free passes, free tickets, mileage or transportation, which give to the recipients an unfair and unlawful advantage over other persons, and this defendant further denies that it has discriminated or that it discriminates, or that it intends to discriminate, in favor of some persons and against other persons with the false and fraudulent intent to defraud or cheat the laws of the State of Nebraska, as alleged in the first paragraph of the third cause of action of the plaintiffs' petition or bill of complaint.

## XI.

This defendant expressly denies that it has, in violation
28 of law, defied the lawful orders of the said the Nebraska
State Railway Commission; denies it has denied the authority of said Commission to make and enforce its orders, and denies that by concealment it has attempted to evade the laws of Nebraska and the orders of said Railway Commission, and denies that it has refused to disclose the true condition of its business and the facts demanded by said Railway Commission; denies that it has concealed from said Railway Commission and the people of the State of Nebraska the true condition of its business affairs as a common carrier of freight and passengers in said State, as alleged in the fourth cause of action set forth in said petition or bill of complaint.

XII.

This defendant denies that any of the acts done or performed by it are contrary to law, equity or good conscience, or that they will or can, work to the injury of the plaintiffs in this cause, or to the people of the State of Nebraska, and denies that any wrongs or wrongful acts on the part of this defendant have been threatened or committed, and this defendant especially denies that said plaintiffs are without adequate remedy, except in a court of equity, as alleged in the second paragraph of the 4th cause of action set forth in the plaintiffs' petition or bill of complaint.

Wherefore, this defendant, having fully answered, confessed, traversed, avoided or denied all matters in the plaintiffs' said petition or bill of complaint, material to be answered according to its best knowledge and belief, humbly prays this Honorable Court to enter its decree and judgment that this defendant be hence dismissed, with its reasonable charges and costs, in this behalf most wrongfully expended, and for such other and further relief in the premises as to this Honorable Court may seem meet and
29 in accordance with equity.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.
By JAMES E. KELBY, *Its Solicitor.*

STATE OF NEBRASKA, *County of Douglas, ss:*

I, James E. Kelby, being first duly sworn, on my oath depose and say that I am one of the duly authorized attorneys for the above named defendant, which is a non-resident corporation, and that I have read the foregoing answer, know the contents thereof, and that the statements therein contained are true as I verily believe.

JAMES E. KELBY.

Subscribed in my presence and sworn to before me this 29th day of June, A. D. 1907.

[SEAL.] S. N. MEALIO,
*Notary Public.*

Endorsed: Filed Jul- 3 1907 Geo. H. Thummel, Clerk, By F. A. Harrison, Deputy.

30 Thereupon afterwards, to-wit: On the 12th day of July 1907, Motion was filed in said case, which said Motion is in the words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Lincoln Division.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION, HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission, Plaintiffs,

*v.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

*Motion to Remand.*

Come now the plaintiffs in the above entitled cause and move the court to remand the same to the supreme court of the State of Nebraska, for the following reasons:

1. This court has not jurisdiction to hear and determine the cause.
2. This court has no jurisdiction over the subject matter set forth and contained in plaintiffs' petition.
3. This court has no jurisdiction of the parties herein nor of any of them.

WILLIAM T. THOMPSON,
*Attorney General,*
W. B. ROSE AND
GRANT G. MARTIN,
*Attorneys for Plaintiffs.*

Endorsed: Filed Jul- 12 1907. Geo. H. Thummel, Clerk. By F. A. Harrison, Deputy.

31 Thereupon afterwards, to-wit: At the May 1907, Term of said Court, and on the 12th day of July, 1907, the following proceedings were had and done in said cause, as appear of record in Journal "6" of said Court, to-wit:

No. 17, A.

STATE OF NEBR., etc.,

*v.*

CHI., BURL. & QUINCY RY. CO.

This cause came on to be heard on the motion of the Complainant to remand the action to the State Court, which was argued and submitted.

32 Thereupon afterwards, to-wit: On the 23rd day of September, 1907, memorandum opinion was filed in said case, which said Memorandum Opinion is in the words and figures following to-wit:

*Memorandum Opinion.*

In the Circuit Court of the United States for the District of Nebraska.

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Defendants.

SAME PLAINTIFFS

*vs.*

MISSOURI PACIFIC RAILWAY COMPANY.

SAME PLAINTIFFS

*vs.*

UNION PACIFIC RAILROAD COMPANY.

SAME PLAINTIFFS

*vs.*

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

W. T. Thompson, Attorney General and W. B. Rose, Deputy Attorney General, Attorneys for Complainants.

James Kelby and W. D. McHugh, Attorneys for Chicago Burlington & Quincy.

B. P. Wagoner, Attorney for Missouri Pacific Railroad Company.

John N. Baldwin, Edson Rich, and W. D. McHugh, Attorneys for Union Pacific Railroad Company.

W. D. McHugh, Attorney for Chicago, R. I. & P. R. R. Co.

Before W. H. Munger and T. C. Munger, District Judges.

T. C. MUNGER, *D. J.:*

These cases all involve the same questions.

33 The Legislature of the State of Nebraska passed an Act, approved March 27th, 1907, conferring powers and duties upon the State Railway Commission, and providing that said commission should have the power to regulate the rates and services of and to exercise a general control over all railroads within the State, and further providing that said commission should have the power, and it should be its duty, to make all necessary classifications and to fix all necessary rates, charges, and regulations to govern and regulate the freight and passenger tariffs of railway companies, with power to correct abuses and correct unjust discriminations,

extortions, and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having certain penalties provided by the Act inflicted, through proper courts having jurisdiction. Section 2. (*b.*) (*d.*)

By section 11 of the same Act it is provided that if any railroad company shall violate, refuse or neglect to obey any orders of the commission, the commissioner or any company or person interested in such orders may apply in a summary way, by petition, to the district court of the county in which the violation or disobedience shall happen, and that court is given the power to hear and determine the matter in a summary way, as a court of equity.

The Nebraska Legislature also passed an Act, approved March 6, 1907, making it unlawful for any railroad operating in the state to charge more than two cents per mile for the transportation of passengers over the lines of road in the state.

The Legislature also passed another Act, approved April 8th, 1907, making it unlawful for any railway company to charge for the transportation of live stock, potatoes, grain and grain
34 products, fruit, coal, lumber, or building material, in carload lots, within the State of Nebraska, more than eighty-five per cent. of the amount fixed in the classification and schedules of such railway companies for the transportation of such property in force and effect on their various lines of railway on the first day of January, 1907, until after the State Railway Commission shall have provided the greater rate on any article or property in such schedule.

The Legislature further passed an Act, approved March 30, 1907, making it unlawful for any railroad company operating any line of railroad in the state of Nebraska directly or indirectly to issue or give to any person or persons, with certain exceptions, any free ticket, free pass, or free transportation, in any form, for transportation over any lines of railroad in the state of Nebraska.

Following the enactment of these laws, this action was begun in the Supreme Court of the state of Nebraska, and in the petition the plaintiffs are named as follows: The State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr. as members of the Nebraska State Railway Commission, of the State of Nebraska,—and it is alleged that the plaintiff William T. Thompson is the attorney general of the State of Nebraska, and that it is his duty as such attorney general to bring and prosecute all suits necessary for the proper enforcement of all lawful intra-state rates and charges for transportation of freight and passengers within the state of Nebraska; that Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr. are the railway commissioners of Nebraska, and that it is their duty as such, under the laws of Nebraska,
35 to determine, regulate and enforce proper and lawful intra-state rates and charges for the transportation of freight over railroad lines in the state of Nebraska, and to enforce thereunder on such railroads all lawful intra-state rates and charges for the transportation of passengers.

No further interest of the state of Nebraska appears except such as arises from implication from the pleading of the foregoing facts.

The petition alleges that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Iowa, and that the defendant threatens to put in force in the state of Nebraska an unlawful rate for the transportation of passengers, exceeding two cents per mile.

For a second cause of action the plaintiff alleges that the defendant threatens to put in force unlawful freight rates in excess of the rate of eighty-five per cent. of the amount of the classifications and schedules of freight charges in force January 1, 1907.

For a third cause of action the plaintiff alleges that the defendant has unlawfully issued and is issuing and threatens to issue to persons free transportation, free passes, and free tickets, in violation of the Act of the Legislature approved March 30, 1907.

The fourth cause of action alleges that the defendant has unlawfully defied the lawful orders of the State Railway Commission and its authority to regulate freight and passenger rates in the state of Nebraska and to make and enforce its orders and has refused to disclose the true condition of its business, as required by law.

The prayer of the petition is for an injunction restraining the defendant from violating the several laws and orders alleged in the petition.

36 The case was removed to this court upon the petition of the defendant, and a motion to remand the same to the State Supreme Court has been submitted.

The question involved in this case is whether the action is one that may be removed into the United States Circuit Court. The solution of this question depends on the construction of the Act of Congress of March 3, 1887, which gives cognizance to the circuit court of the United States of "all suits of a civil nature, at common law or in equity * * * in which there shall be a controversy between citizens of different states, in which the matter in controversy exceeds, exclusive of interest and costs" the sum of two thousand dollars.

The complainants contend that the action does not come within the statute for the reason that the Act of Congress refers only to controversies between citizens of different states and not to controversies between the state and citizens.

The fact that the suit is brought in the name of the state does not determine whether or not it is really a party in interest.

In the cases of New Hampshire *vs.* Louisiana and New York *vs.* Louisiana, 108 U. S. 76, the states were named as parties plaintiff and defendant, but the Court on an examination of the cases as stated in the pleading held that the states as plaintiffs were not suing for their own benefit but for the benefit of certain individuals, and that the Court would look through and behind the nominal parties on the record to ascertain who were the real parties to the suit. In the later case of *In re* Ayres, 123 U. S. 492, the Court held that although the State was not named as a party, yet it was actually the real party in interest and said "whether it is the actual

party, in the sense of the prohibition of the Constitution,
37 must be determined by a consideration of the nature of the case as presented in the whole record."

The complainants' bill does not allege that any pecuniary interest of the state is affected. In the arguments of complainants the only interest of the state claimed to be involved is its governmental interest in the welfare of its citizens, and it is declared that a state has the right to enjoin a violation of the law. Most of the cases cited to sustain this doctrine do not go that far. *In re* Debs, 158 U. S. 584, was a case where the right of the United States to prosecute an action was sustained upon the right to control the carriage of the United States mail, and the further right to enjoin a nuisance. No such question is here involved. A number of English decisions are cited, but from an examination of these cases it appears that the right of the attorney general or other representative of the government to maintain those actions arose from the fact that the defendants were maintaining a nuisance, or acting in excess of their corporate powers. No English case is cited where it was held that the government could maintain an action for an injunction on the sole ground of its interest in the welfare of its citizens. The jurisdiction of the courts to inquire by proceedings in the nature of *quo warranto* into alleged usurpations of authority is beyond question, but no such question is here presented. Other cases cited, Stockton *vs.* R. R. Co. 50 N. J. Eq., 80; Trust Co. *vs.* Georgia, 109 Ga., 748; Louisville *vs.* Commonwealth, 97 Ky., 695, were also cases to restrain acts of corporations in excess of their chartered powers while the case of Attorney General *vs.* Jamaica, 133 Mass., 363, was a case where the defendant was both exceeding its power and creating a nuisance.

38 In the case of Atty. Gen. *vs.* R. R. 35, Wis., 550, and in the case of Hickman *vs.* M. K. & T. Ry., 151 Mo., 644, 52 S. W., 351, the interest of the state in an action similar to this is vigorously upheld. In the latter case, a statute of Missouri was involved, which gave to a Board of Railway Commissioners similar powers to those conferred by the Nebraska statute. The Missouri Railway Commissioners had made an order reducing rates of toll over the Booneville bridge and on failure to comply with this order they brought suit to compel compliance with the order. This cause was removed to the United States Circuit Court, but the state court proceeded with the case. The case was taken on error to the Supreme Court of the United States and the same contention was made, that the State was really a party in interest in the action, and hence it was not such an action as could be removed from the state to the United States court. In passing upon this question the Supreme Court of the United States said:

"It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for it that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce

rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person. Reagan *v.* Farmers' Loan & Trust Co. 154 U. S. 362-390."

39 In the case of Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S. 390, it was likewise contended that the State was the real party in interest because the action was one to restrain the State Railway Commission and attorney general from enforcing certain rates for transportation of freight. In passing upon the question, the Supreme Court of the United States said:

"Applicants invoke the doctrines laid down in these two quotations, and insist that this action can not be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal Court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree

40 which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes, illegal in whole or in part."

These cases are decisive of the question involved in the case before us and it is incumbent on this court to follow the rule of law so authoritatively stated.

The case of Fitts *vs.* McGhee, 172 U. S. 516, is not applicable to the case at bar, because that action sought to enjoin the Attorney General of Alabama and the Solicitor of the Eleventh Judicial Circuit from instituting certain criminal prosecutions. In such actions the state was clearly a party in interest.

The case of Arkansas *vs.* Kansas, etc., 183 U. S. 185 is likewise inapplicable in this controversy. In the language of the Chief Justice,—"the gravamen of the bill was the injury to the health, morals, peace and good order of the town and county." The state was thus properly a party plaintiff in the assertion of its police power.

In the late case of Georgia *vs.* Tennessee Copper Co., 27 Sup. Ct.

Rep. 618, the State of Georgia was held to have the right to enjoin the pollution of the atmosphere and the destruction of vegetation over a large portion of its territory, but this was for the reason that the State, as a sovereign, had a property interest in its domain. In this case, there is no property right of the State involved, nor is this suit brought in aid of the police power, nor as a direct prosecution or suit for penalties, and the state as an artificial person has no real interest in the action.

41 It is further contended that the subject matter of the suit is such that the Federal Court cannot properly administer the Nebraska statutes involved. This question necessarily was involved in the case of Missouri &c. Ry. Co. *vs.* Missouri Railroad Comrs., 183 U. S. 53, above cited. In that case the Board of Railway Commissioners was proceeding by an action in the State Court to carry out the peculiar provisions of the Missouri statute. The method provided was similar to the terms of the Nebraska statute in this case. In the case now under consideration on the suit is not one to execute the statutory provisions of this state, but is one asserted on general equitable principles to enjoin a threatened violation of law and no reason is perceived why the United States court may not deal with the subject matter as fully as the state court.

It is also contended that in case of doubt it is the duty of this court to remand the case to the state court. This is not the rule of the Circuit Court of Appeals for this Circuit.

Boatman's Bank *vs.* Fritzlen, 135 F. 650. But no doubt is entertained that the state of Nebraska in this case has no real interest as an artificial person and therefore the motion to remand will be overruled.

W. H. Munger, District Judge, concurs.

Endorsed: Filed Sep. 23 1907. Geo. H. Thummel, Clerk.

42 Thereupon afterwards, to-wit:—At the May 1907 Term of said Court, and on the 25th day of September, 1907, an order was signed and filed in said case, and duly entered of record in Journal "6" of said Court, to-wit:

THE STATE OF NEBRASKA; WILLIAM T. THOMPSON, Attorney General; NEBRASKA STATE RAILWAY COMMISSION; HUDSON J. WINNETT, J. A. WILLIAMS, and HENRY T. CLARKE, JR., as Members of the Nebraska State Railway Commission of the State of Nebraska, Plaintiffs,

*v.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

And now, September 25, 1907, this cause on a former day of a session of this court having been argued by counsel for both parties on motion of the state of Nebraska to remand the cause to the Supreme Court of the State of Nebraska for want of jurisdiction, and the said motion having been taken under advisement, and the court now being fully advised in the premises, it is

Ordered and decreed that the said motion be, and the same hereby is overruled. William H. Munger, J., concurring. To this ruling and order the State of Nebraska excepts. Leave given Defendant to amend its Cross Bill in thirteen days.

THOMAS C. MUNGER, *Judge.*

Endorsed: Filed Sep. 25 1907 Geo. H. Thummel, Clerk. By F. A. Harrison, Deputy.

43 UNITED STATES OF AMERICA,
*District of Nebraska, Lincoln Division, ss:*

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, hereby certify the foregoing to be a true and correct transcript of all such pleadings and orders indicated in the foregoing index as the same appear of record in the office of the Circuit Court of the United States for the District of Nebraska, Lincoln Division in the case of The State of Nebraska, *et al., vs.* Chicago, Burlington & Quincy Railway Company, No. 17 Docket "A."

Witness my hand and the seal of said Court at Omaha in said District this 2nd day of January, A. D. 1908.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL, *Clerk.*

44 [Endorsed:] Supreme Court U. S. October Term, 1907. Term No. 15, Original. *Ex parte* In the Matter of The State of Nebraska, Petitioner. Return to rule to show cause and exhibit thereto. Filed Jan'y 6th, 1908.

Office Supreme Court, U.
FILED.
MAR 5 1908
JAMES H. McKENNE
CL

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

No. 15, Original.

*EX PARTE:* IN THE MATTER OF THE STATE OF NEBRASKA, PETITIONER.

**Brief in Opposition to Application for Writ of Mandamus.**

WILLIAM D. McHUGH,
*Attorney for Respondents.*

MAXWELL EVARTS,
*Of Counsel.*

OMAHA PRINTING COMPANY, OMAHA, NEB.

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1907.**

---

**No. 15, Original.**

---

*EX PARTE:* IN THE MATTER OF THE STATE OF NEBRASKA, PETITIONER.

---

**Brief in Opposition to Application for Writ of Mandamus.**

---

## STATEMENT.

On the fifteenth of June, 1907, a suit was instituted in the Supreme Court of the State of Nebraska. Upon the record the plaintiffs in the suit were, the State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska. The defendant was the Chicago, Burlington & Quincy Railroad Company. The object and purpose of the suit were to enjoin the defendant from charging more for the transportation of freight and passengers within the State of Nebraska, than the rates fixed for such transportation in certain acts of the legislature of the State of Nebraska, and also to enjoin the defendant from disobeying the orders of the Nebraska State Railway Commission, and from concealing from said Nebraska State Railway Commission, the condition of its business, and from making any unlawful discrimination in violation of a state statute.

On the twenty-second of June, 1907, the defendant company filed, in said suit, a petition for the removal of the action

to the Circuit Court of the United States. The petition for removal alleged that in said suit there was a controversy wholly between citizens of different States; that is, a controversy between the defendant, a corporation of the State of Iowa, on the one side, and the individual defendants and the Nebraska State Railway Commission, all of whom are citizens of the State of Nebraska, on the other side. The petition for removal further alleged that the State of Nebraska, a party plaintiff in the suit, was not a proper or necessary party to said suit, and that it was not the real party in interest in said suit and that it had no interest, beneficial or otherwise in said suit, and that it had been named as a party plaintiff, simply for the purpose of depriving the Circuit Court of the United States of jurisdiction of the said suit.

A sufficient bond having been filed with the petition for removal, a transcript of the record in the action was duly filed, by the defendant, in the office of the Clerk of the Circuit Court of the United States for the District of Nebraska, on the third day of July, 1907.

The plaintiffs in the said action, on the twelfth day of July, 1907, filed a motion to remand the case to the Supreme Court of the State of Nebraska. The motion presented no issue of fact, but was based upon the claim that the Circuit Court of the United States did not have jurisdiction over the subject-matter of said action, or of the parties thereto, and had no jurisdiction to hear or determine the cause.

The motion to remand, having been duly argued and submitted to the Court, was overruled for reasons set forth in an opinion filed in the case.

Subsequently, upon a petition filed in this Court for a writ of mandamus, and upon motion, a rule was entered directing the Honorable William H. Munger, and Honorable Thomas C. Munger, United States District Judges for the District of Nebraska, holding the Circuit Court of the United States in and for the District of Nebraska, to show cause why the said petition for mandamus should not be granted. The purpose of the

writ is to obtain the remand of the said action to the Supreme Court of the State of Nebraska.

To the rule the said judges have made return, in which, after reciting the proceedings had in said Circuit Court, in said action, they show that it became and was their duty as judges holding said Court, to hear the argument of the respective attorneys, on the said motion to remand, and consider the same, and decide said motion. And thereupon, pursuant to said duty, the said judges holding said Court, heard the arguments and decided the said motion. The return further shows that the said motion was overruled by said judges holding said Court in the exercise of the jurisdiction conferred upon them by law, and that their said decision upon said motion was the exercise of judicial judgment and discretion vested in the said judges. With the return, and as a part thereof, is a complete transcript of the record of said cause in the said Circuit Court.

## I.

**Mandamus is not the proper remedy in this case. The Writ of Mandamus cannot be used to perform the office of an appeal or writ of error; it will not issue to compel the Circuit Court to reverse its decision refusing to remand a case removed by a defendant on the ground that there is, in the case, a controversy wholly between citizens of different States, to the complete determination of which controversy, one of the plaintiffs of record is not an indispensable or necessary party. Such a decision, being within the jurisdiction and discretion of the Court, should be reviewed after final judgment by appeal or writ of error.**

The power of this Court to issue writs of mandamus in proper cases, is clearly given and has frequenty been exercised.

Under Section 716, Revised Statutes U. S., this Court has power to issue the writ whenever necessary to render its appellate jurisdiction effectual. This power was asserted in *Ex Parte The Milwaukee R. R. Co.*, 5 Wall. 188, and was exercised in *Ex Parte Bradstreet* 7 Peters, 634.

Under Section 688, Revised Statutes U. S. (Second Edition) this Court has general power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any Courts appointed under the authority of the United States.

Under the powers granted, this Court has, in numerous instances, issued the writ of mandamus to an inferior Court to compel such Court to take jurisdiction of a cause when it wrongfully refused so to do. This right was asserted in *Railroad Company v. Wiswall* 23 Wallace, 507, and in *Insurance Company v. Comstock* 16 Wallace 258 and *In re Grossmayer Petitioner* 177 U. S. 48 and was exercised in *In re Hohorst Petitioner* 150 U. S. 653.

This Court has issued a writ of mandamus to an inferior Court commanding it to remand a cause when it affirmatively appears from the record that such Court has no jurisdiction to hear or determine any question presented in the cause. Where, upon the record, it is clear that no judicial power or discretion can rightfully be exercised by the lower Court, the writ of mandamus will issue to command the remanding of the cause.

The first case in which this Court issued the writ of mandamus to compel an inferior tribunal to abandon an attempted exercise of a jurisdiction it did not possess, was *Ex Parte Bradley* 7 Wall. 364. In that case, the Supreme Court of the District of Columbia attempted to disbar Bradley from the office of attorney in said Court because of offensive language used by him in the Criminal Court. This Court held that the Supreme Court of the District of Columbia was a different court from the Criminal Court, and hence the former had no power to disbar an attorney for a contempt of the latter. The writ was issued, the Court saying:

> "The ground of our decision upon this branch of the case is, that the Court below had no jurisdiction to disbar the relator for a contempt committed before another Court."

But, that its decision should not be held to be broader than the point decided, this Court, in its opinion, quoted from Chief Justice Taney, the following:

> "We are not aware of any case where a mandamus has issued to an inferior tribunal commanding it to reverse or amend its decision when the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion."

In the following cases, this Court issued the writ of mandamus to compel inferior tribunals to abandon the attempted exercise of jurisdiction where, from the record, it was clear

that no right existed in the inferior tribunal to exercise any discretion in the cause: *Virginia v. Rives*, 100 U. S. 313; *Virginia v. Paul*, 148 U. S. 107; *Kentucky v. Powers*, 201 U. S. 1.

The latest case in which this Court issued the writ of mandamus to a lower Court commanding it to remand a cause over which it had no right to exercise any jurisdiction, is the case *Ex Parte Wisner* 203 U. S. 449. Upon this case the petitioner herein seems to rely. In that case, a suit was brought by a citizen of Michigan against a citizen of Louisiana in the courts of Missouri. The defendant removed it to the Circuit Court of the United States for the Eastern District of Missouri. A motion to remand was overruled by that Court; and the plaintiff applied to this Court for a writ of mandamus, which was granted.

This Court based its decision upon the well settled principle that no action can be removed to a Federal Court which could not have been begun in that Court. Inasmuch as the Federal Court for Missouri would not have jurisdiction of a suit originally begun therein by a citizen of Michigan against a citizen of Louisiana, it followed that no jurisdiction of such a cause could be acquired by removal. Inasmuch, therefore, as the Federal Court had no right or power to exercise any jurisdiction in the cause, the writ of mandamus was issued to compel a remand.

The distinction between the *Wisner* case and the case at bar is manifest and fundamental. In the *Wisner* case, it affirmatively appeared that there was no question in the record upon which the judicial action of the Federal Court could be had. As the case could not have been begun in the Federal Court, that tribunal could exercise no judicial discretion respecting it. In issuing the writ of mandamus in that case, this Court did not review or reverse or consider any judicial action or discretion of the lower Court. The cause was ordered remanded, not on the ground of an erroneous judicial decision by the lower Court, but because that tribunal had no right to exercise any judicial power respecting it. The utter lack of

jurisdiction affirmatively appearing, no judicial action by the lower Court could be lawfully taken. The removal proceedings were on their face defective and could not have the effect of giving the Federal Court any right to decide any question in the case.

The case at bar is essentially different from the *Wisner* case. In this case, the removal was prayed for upon the ground that there is, in the case, a controversy between citizens of different States, to the complete determination of which the State of Nebraska was not an indispensable or necessary party. The averments of the petition of removal in that regard are as follows:

> "Your petitioner further avers that in the above entitled suit there is a controversy which is wholly between citizens of different states, to-wit: A controversy between your petitioner, Chicago, Burlington & Quincy Railway Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been and now is a corporation created and existing under and by virtue of the laws of the State of Iowa; the said William T. Thompson, Attorney General of the State of Nebraska, one of the plaintiffs, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska; the Nebraska State Railway Commission, a board organized under the laws of the State of Nebraska for the supervision of railways in said State, and the members composing the said Board, whom your petitioner avers were, at the time of the commencement of this suit, ever since have been and still are citizens and residents of the state of Nebraska; the said Hudson J. Winnett, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska; the said J. A. Williams, one of the plaintiffs and

a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the state of Nebraska, and the said Henry T. Clarke, Jr., one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska. And your petitioner avers that it was not at the time of the commencement of this suit, nor since has been and is not now a resident or citizen of the state of Nebraska.

"Your petitioner further avers that the State of Nebraska as a party plaintiff in the said suit, is not a proper or necessary party in the said suit; that the said State of Nebraska is not the real party in interest in the said suit; that the said State of Nebraska has no interest, beneficial or otherwise in the said suit, and has been named as a party plaintiff simply for the purpose of depriving the Circuit Court of the United States of jurisdiction over this suit." (Return, p. 8.)

The motion to remand tendered no issue of fact and presented only the legal question as to whether the foregoing averments were sufficient in law and authorized by the record in the case.

On the hearing of the motion to remand in this case, the Circuit Court had before it, for decision, the question whether there was, in the case, as presented by the petition, a controversy wholly between citizens of different States, to the complete determination of which the State of Nebraska was not an indispensable or necessary party. If the contention of the defendant in that regard was correct, the action could have been originally brought in the Federal Court and its jurisdiction of the case was complete on removal.

In the case at bar, therefore the Circuit Court, on the hearing of the motion to remand, was under the necessity of

exercising its judicial discretion upon a question presented by the record. That Court was called upon to determine whether the petition filed presented a case wherein there was a controversy, between citizens of different States, to the complete determination of which the State of Nebraska was not an indispensable or necessary party. The decision of that question was judicial action; that judicial action the Circuit Court had the power to take. The Circuit Court not only possessed the power to decide the question, but it was also under obligation to decide it. It was not only the right of the Circuit Court to exercise its judicial discretion in deciding the question, but it was its duty to do so. If that Court had refused to exercise its judicial function and decide the question, its action could have been coerced. The jurisdiction of the Circuit Court to determine the question presented by the record is manifest and complete.

Here, then, is the essential difference between the case at bar and the *Wisner* case. In the *Wisner* case, the record disclosed the fact that the Circuit Court had no power to decide any question in the case; in the present case, the record discloses the fact that the Circuit Court had the power to decide the question presented, and was under obligation to exercise its judicial discretion in the decision. In the *Wisner* case, the duty of the Circuit Court to remand the case was apparent from the record and no review of its decision was involved; in the case at bar, the duty to remand can not be determined except by reviewing the decision of the Circuit Court upon the question presented and finding that such decision was erroneous. In the *Wisner* case, the question was: Had the Circuit Court any power to act at all; in the case at bar, the question is: Did the Circuit Court correctly decide that the petition disclosed a case wherein there is a controversy between citizens of different States, to the complete determination of which, the State of Nebraska is not an indispensable or necessary party? In the *Wisner* case, a writ of mandamus could issue because it involved no review of any decision of the Circuit Court; in the present case, no writ of mandamus can issue be-

cause to do so would be to make that writ take the place of an appeal or writ of error.

That the writ of mandamus will not be used to perform the office of an appeal or writ of error, has been the constant holding of this Court.

*United States v. Lawrence*, 3 Dallas 42, was the first decision of this court upon an application for a writ of mandamus. Judge Lawrence had refused, after consideration, to issue a warrant for Captain Barre as a deserter from a French vessel, and the writ was prayed to compel the issuance of the warrant. The Court refused to grant the writ saying:

> "We are clearly and unanimously of opinion that a mandamus ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment but his own."

In *Ex Parte Bradley* 7 Wall. 364, it is said (p. 377):

> "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or amend its decision, when the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion."

In *Ex Parte Loring* 94 U. S. 418, it is said (p. 419):

> "It seems clear to us that the object in this case is to use the writ of mandamus as a writ of error. This cannot be done. We may require the Circuit Court to decide in a proper case if it refuses to act, but cannot control its decision. Here the Court has acted, and given its decision

upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of mandamus has no such office to perform."

*Ex Parte Hoard* 105 U. S. 578 was a case in which it appeared that the Chesapeake & Ohio Railroad Company sued in the State Court of West Virginia to appropriate, for its use, certain lands. The Company afterwards filed a petition and bond for the removal of the cause to the Federal Court, and lodged in that Court a transcript of the record in the cause. A motion to remand was made and was overruled by the Federal Court. Thereupon the moving party applied to this Court by petition for a writ of mandamus commanding the lower Court to remand the cause. The writ was denied by this Court. In the opinion, the court said (p. 579):

"Before the act of 1875, it was held in *Insurance Company v. Comstock* (16 Wall 258), followed in *Railroad Company v. Wiswall* (23 id., 507), that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by mandamus from this court 'to compel the Circuit Court to proceed to a final judgment or decree,' and not by writ of error or appeal. This was on the authority of *Ex parte Bradstreet* (7 Pet. 633), in which Mr. Chief Justice Marshall delivered the opinion. No case can be found, however, in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or writ of error can be taken; and in *Ex parte Bradstreet* it was stated, as the reason for allowing the mandamus, 'that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of Two Thousand Dollars,' now,

of course, Five Thousand. If the cause be retained, it may go to final judgment or decree, and the reason assigned for the mandamus in case of dismissal does not exist. If it be improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in *Railroad Company v. Koontz* 104 U. S. 5.

"It is of no importance that the value of the matter in dispute may be less than $5,000. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The act of 1875 has given an appeal or a writ of error to this court for the review of orders to remand without regard to the amount involved *Babbitt v. Clark*, 103 id. 606.

"The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final *Ex parte Ferry Company*, 104 id. 519.

"It is an elementary principle that a mandamus can not be used to perform the office of an appeal or a writ of error *Ex parte Loring*, 94 id. 418.

"Without determining, therefore, whether the case was properly removed or not, the writ is denied."

*In re Rice* 155 U. S. 396 was a case wherein a writ of mandamus was prayed. The court said (p. 403):

"The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction. The writ can not be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law."

*In re Atlantic City Railroad* 164 U. S. 633, was a case wherein the Court again states the proposition for which we contend as follows (p. 635):

"The general power of the court to issue a writ of mandamus to an inferior Court to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error (*In re Pennsylvania Co., Petitioner*, 137 U. S. 451; *In re Morrison, Petitioner*, 147 U. S. 14; *Ex Parte Railway Company*, 103 U. S. 794; *Ex Parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566).

* * * * *

"In this case, however, the Circuit Court entertained jurisdiction and the petitioner has its remedy by appeal if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled. *Southern Pacific Company v. Denton*, 146 U. S. 202.

"To direct the exercise of jurisdiction is quite different from a mandate not to do so, and we think we should not interpose at this stage of the case in the manner desired."

*In re James Pollitz, Petitioner*, 206 U. S. 323, is the latest expression by this Court of the proposition of law under discussion. The case is, in its essentials identical with the case at bar. It appeared in that case that Pollitz had brought suit in the Supreme Court of New York against the Wabash Railroad Company and a number of the defendants. Pollitz was a citizen of the State of New York; a number of the defendants were citizens of the State of New York; the Wabash Railroad Company was a corporation organized under the laws of States other than New York. The Wabash Railroad Company filed a petition to remove the case to the Circuit Court of the United States for the Southern District of New York. The petition for removal alleged that there was, in the cause, a controversy between citizens of different States, to the determination of which controversy, the defendants, citizens of the State of New York were not indispensable or necessary parties. The cause

was removed and Pollitz made a motion to remand which was denied. Pollitz applied to this Court for a writ of mandamus directing the remanding of the cause to the State Court. The rule was entered, and a return was made to the effect that the order denying the motion to remand had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the Circuit Judge by law, and for the reasons expressed in the opinion filed with the order.

The court refused to issue the writ, saying (p. 330):

"The suit was commenced in the state court by a citizen and resident of the city, county and State of New York against a corporation, a citizen of the State of Ohio, and other defendants, many of whom were residents and citizens of the State of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

"The defendant, the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the suit into the United States Circuit Court for the Southern District of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the Circuit Court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision although in its nature a judicial act and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. *In re Grossmayer, Petitioner*, 177 U. S. 48; *In re Hohorst, Petitioner*, 150 U. S. 653. And so where the court assumes to exercise jurisdiction on removal when on the face of the record absolutely no jurisdiction has attached. *Virginia v. Paul*, 148 U. S. 107; *Ex parte Wisner*, 203 U. S. 449.

"In *In re Hohorst, Petitioner*, 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants was not a final decree from which an appeal would lie. 148 U. S. 262. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the Circuit Court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded. *In re Atlantic City Railroad*, 164 U. S. 633.

"*In Ex parte Wisner*, Wisner, a citizen of the State of Michigan, commenced an action at law in the Circuit Court for the city of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the state court into the Circuit Court of the

United States for the Eastern District of Missouri, on the ground of diversity of citizenship with the proper bond, and an order of removal was made by the state court, and the transcript of record was filed in the Circuit Court. Wisner (who had had no choice but to sue in the state court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the Circuit Court, and that, as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the Circuit Court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. The motion to remand was denied, and Wisner applied to this Court for a writ of mandamus which was subsequently awarded.

"In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the Circuit Court against the railroad company as sole defendant.

"If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company v. Fitzgerald*, 160 U. S. 556-582."

The law provides that if this case is one wherein there is a controversy wholly between citizens of different States, to the complete determination of which other parties to the record are not indispensable or necessary, then the removal being properly sought on that ground, the Federal Court had jurisdiction. Under the law, if the State of Nebraska had no inter-

est in the controversy, its presence on the record as a plaintiff would not defeat the jurisdiction of the Federal Court. Under the law, to the Circuit Court is committed the decision of those questions in the first instance. The decision of that Court, upon the question presented, has been made. If the dedicision is erroneous it may be corrected on appeal or error proceedings. But the correctness of the decision cannot be examined upon this application. The writ of mandamus cannot be used to perform the office of an appeal or writ of error.

## II.

**If petitioner is aggrieved by the decision of the Circuit Court, the proper remedy is by appeal after entry of final decree.**

*In re Pollitz* 206 U. S. 323, speaking of this precise point, this Court said (p. 333):

> "If the ruling of the Circuit Court was erroneous as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error."

## III.

**The presence on the record of the State of Nebraska as one of the parties plantiff, does not of itself necessarily defeat the jurisdiction of the Federal Court.**

It is well settled, that the jurisdiction of the Federal Court is not conclusively determined by an inspection of the position occupied by the parties as plaintiffs or defendants, in the suit. On the contrary, it is the duty of Federal Courts to examine the record and arrange the parties to the suit on opposite sides of the controversy, as their interests appear. Formal parties or parties having no real legal interest in the controversy, are not considered in the determination of the question of the jurisdiction of the Federal Courts.

In the *Removal Cases*, 100 U. S. 457, Mr. Chief Justice Waite, speaking for the court, said (p. 468):

> "The second section of that act contains, among others, the following provision: 'That any suit of a civil nature, at law or in equity, now pending * * * in any State court, where the matter in dispute exceeds, exclusive of

costs, the sum or value of five hundred dollars * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court of the United States for the proper district.'

"This we understand to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Company v. Blatchford*, 11 Wall. 174. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists."

In *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, the jurisdiction of this court was invoked in two suits; one brought in the name of the State of New Hampshire against the State of Louisiana, and one in the name of the State of New York against the State of Louisiana. The jurisdiction of this Court was challenged upon the ground that, although the parties plaintiff were the States as aforesaid, and, according to the title of the cause, as given by the pleader, they appeared to be suits between States, yet that the States named as plaintiffs in the causes had, in fact, no real interest in the

controversy. This court investigated the record and found that the suits were brought in the name of the States, but really for the purpose of collecting certain bonds owned by individuals and that the suit was really in the interest of individuals and not in fact, a controversy between States. The jurisdiction of this Court was, therefore, denied and the causes were dismissed upon the ground that although the States were named as plaintiffs, that fact was not conclusive as to the jurisdiction of the Court and, when it appeared upon the investigation of the record that the States had no real legal interest in the controversy, their presence on the record as parties plaintiff would not give to the court jurisdiction.

In *Louisiana v. Texas*, 176 U. S. 1, a suit was begun in this court by the State of Louisiana as plaintiff, against the State of Texas as defendant. This Court examined the record in the case for the purpose of determining whether the State of Louisiana had any substantial legal interest in the controversy; and, finding that as a State it had no substantial legal interest, the jurisdiction of this Court was denied and the suit dismissed, notwithstanding the fact that the State of Louisiana was, on the record, a party plaintiff.

In *State of Missouri v. Alt, et al.* 73 Fed. 302, a case was presented brought in the name of the State of Missouri in behalf of and to the use of the public schools of Cape Girardeau County v. Alt, et al. to procure the cancellation of a deed. The suit was brought in the state court and removed by the defendants, to the Federal Court. The jurisdiction of the Federal Court was challenged upon the ground that the State of Missouri, being the party plaintiff, the Federal Court could acquire no jurisdiction of the causes.

Judge Thayer, overruling the motion to remand, held that the mere presence on the record of the State of Missouri as a party plaintiff, did not defeat the jurisdiction of the Federal Court because it appeared that the State of Missouri had no substantial legal interest in the controversy, and that it was not a real party in interest thereto. The court said (p. 303):

"I observe that the case is entitled, 'The State of Missouri, in behalf of, and to the use of, the Public Schools of Cape Girardeau County, against William John Alt and Cape Girardeau County;' and it has occurred to me that the motion to remand may have been filed upon the theory that this court has no jurisdiction because the State of Missouri is a party. If that is the view entertained by the complainant's attorney, it is untenable, for the reason that the State of Missouri, as the record in the case discloses, is not the real complainant. The action is brought by the board of education for the benefit of the public schools of Cape Girardeau county, and it is brought in the name of the state, under a state law (Section 8040, Rev. St. Mo. 1889) which permits the board to bring actions in the name of the state in all suits affecting swamp lands to which the board lays claim in behalf of the public schools of the county. The real complainant in the case is a quasi corporation, called the 'Board of Education.' The State is merely a nominal party. The fact that it is made a party, pursuant to the provisions of the statute above referred to, does not make it a suit by or against the state, in any such sense as to deprive the federal courts of jurisdiction of the controversy."

Not only is it true that the mere presence of the record of a State as a party plaintiff, will not defeat the jurisdiction of the Federal Court when it appears that the State has no real interest in the controversy, but the converse is equally true. If a State is not a party of record, yet, if it appears that the case is one wherein the State is a real party in interest, that fact will be recognized and jurisdiction will not be determined merely by an inspection of the nominal parties to the cause. This proposition was established in an elaborate opinion in *In re Ayers*, 123 U. S. 443. The opinion of the court upon the point in question is well stated in the syllabus, as follows:

"Whether a State is the actual party defendant in a suit within the meaning of the Eleventh Amendment to the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not in every case by a reference to the nominal parties of the record."

Upon the hearing of the motion to remand, in the present case, the Circuit Court was not bound to adjudicate the question merely by an inspection of the nominal parties to the record. The mere presence of the State of Nebraska as a party plaintiff, was not of itself, sufficient necessarily to defeat the jurisdiction of the Federal Court. It became and was the duty of the Circuit Court to determine the question whether the State of Nebraska was the actual party plaintiff in the present suit, and to determine that question, by a consideration of the nature of the case as presented by the whole record, and not "by a reference to the nominal parties to the record."

This, the Circuit Court did; and, from an inspection of the entire record, for the reason stated in the opinion filed, the court held that, although the State of Nebraska was a nominal party plaintiff on the record, yet it had no real substantial legal interest in the controversy. This decision of the court was one which involved the exercise of the judicial action and judicial discretion of the court; and if a party feels aggrieved by the decision of this question, the remedy is by appeal or error from final decree. The judicial action and discretion of the Circuit Court in its decision of this question, cannot be reviewed or reversed by a writ of mandamus.

## IV.

**The State of Nebraska is not the real party plaintiff in this action.**

In the petition filed in the present case, while the State of Nebraska is joined as a nominal party plaintiff, there is in the petition, no formal showing that the State of Nebraska has any real substantial legal interest in the controversy. There is no allegation that its interests will be affected by the acts of the defendant. There is no averment in the bill to show that the relief sought in the petition, is such as would inure to the State of Nebraska or that the judgment or decree if for the plaintiff, would effectively operate in favor of the State of Nebraska. The petition alleges that the Nebraska State Railway Commission is charged with the duty to regulate proper and lawful *intra state* rates upon the railroad lines operating in the State of Nebraska, and to enforce thereon, all lawful *intra state* rates and charges for the transportation of passengers and freight and to prevent discrimination in such *intra state* freight and passenger rates and charges; and alleges the duty of the Attornel General to bring all suits necessary for that purpose; the suit has for its object and purpose, merely the securing of an injunction against the defendant company to restrain that company from charging for the transportation of freight and passengers within the State of Nebraska, more than the rates fixed by the State authority for that purpose, and from disobeying orders of said Nebraska State Railway Commission, and from concealing from said Commission, the true condition of its business and from making any unlawful discrimination in issuing intrastate passes, mileage tickets and transportation within the state of Nebraska. (See Return to Rule pp. 2-5.)

Is the State of Nebraska, a real party in interest, a real party plaintiff in a suit brought by the State officials, charged

with such duty, to enjoin a railroad company from charging more for transportation than the rates fixed by state authority and from violating orders of the State Railway Commission, and from refusing to disclose to such commission, the true nature of its business? The question whether the State of Nebraska is the real party plaintiff will be determined from a consideration of the nature of the case as disclosed by the record. If the nature of the case is such that the State of Nebraska is the real party plaintiff, the Federal Courts will so decide for all purposes of jurisdiction, even though the State were not named as a party plaintiff. (*In re Ayers supra*). If the nature of the case is such that the State is not a real party plaintiff, the Federal Court will so decide for the purpose of jurisdiction, even though the State is named nominally as a party plaintiff. (*See New Hampshire v. Louisiana supra*).

The precise question whether such a case as this is one in which the State is the real party in interest and the real party plaintiff, has been definitely determined by this court. In *Missouri K. & Texas Railway Company v. Missouri R. R. & Warehouse Commissioners*, 183 U. S. 53, the only question presented, was whether, in a suit brought to enjoin a railroad company from charging greater rates within the State of Missouri than those fixed by State authority, the State of Missouri was the real party plaintiff. The State was not joined as a party plaintiff, but, as we have seen, the question was to be determined not by a view of the nominal parties to the record, but from a consideration of the nature of the case as shown by the whole record. The defendant company presented to the State court, a petition for removal, which was denied. The Supreme Court of the State held that it was proper to go behind the face of the record and inquire who was the real party plaintiff; and, after making such examination, decided that the State was the real party plaintiff and that the Federal Court had no jurisdiction on removal. The case was brought to this court for review from the decision by the Supreme Court of Missouri, and this court, recognizing the rule that a mere inspection of the parties named as plaintiff was not conclusive,

examined the record and the nature of the case, and, in an opinion rendered by Mr. Justice Brewer, to which there was no dissent, held that the nature of the case was such that the State of Missouri was not a real party in interest, and not the real party plaintiff. The court analyzed the nature of the proceeding, showed that there is nothing in such an action which affects the State as such, and that the relief sought does not inure to the State alone, and that a decree in favor of the plaintiff would not effectively operate in favor of the State. This opinion, which we submit is conclusive upon the question presented, is as follows (p. 58-61):

> "The single question presented for our consideration is whether the railway company was entitled to remove this suit from the state to the Federal Court. The state court refused the removal, and the Federal Court, on the other hand, denied a motion to remand. Under these circumstances this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case. *Removal Cases*, 100 U. S. 457, *Stone v. South Carolina*, 117 U. S. 430; *Missouri Pacific Railway Company v. Fitzgerald*, 160 U. S. 556, 582.
>
> "On the face of the record the railway company was entitled to a removal. The plaintiffs were citizens of Missouri, the State in which the suit was brought. The railway company was a citizen of the State of Kansas. There was, therefore, diverse citizenship, the defendant a citizen of another State than that in which the suit was brought petitioning for removal and the removal appears perfect in form.
>
> "But it was held by the Supreme Court of the State of Missouri that it was proper to go behind the face of the record and inquire who was the real party plaintiff, and, making such examination, that court decided that the real party plaintiff was the State of Missouri. If that conclusion be correct then no removal in this case was justifiable, because a State is not a citizen within the meaning

of the Removal Acts. *Stone v. South Carolina*, 117 U. S. 430; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473; *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482.

"Was the State the real party plaintiff? It was at an early day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party, it is the party named in the record *Osborn v. United States Bank*, 9 Wheat. 738. But that technical construction has yielded to one more in consonance with the spirit of the Amendment, and in *In re Ayers*, 123 U. S. 443, it was ruled upon full consideration that the amendment covers not only suits against a State by name, but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the amendment has since been followed. That amendment refers only to suits brought against a State. But applying the same principles of construction to the removal acts and to cases in which it is claimed that the State, though not the nominal is in fact the real party plaintiff, it may be fairly held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson v. Ross*, 38 Fed. Rep. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the State, and it was held by the Circuit Court for the Eastern District of New York that the action was one in which the real party plaintiff was the State. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.

"But this case is not like *Ferguson v. Ross*, and does not come within the rule above stated. It is not an action to recover any money for the State. Its results will not inure to the benefit of the State as a State in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate.

"It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State as an artificial person. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-390.

"While not controverting these general propositions, the Supreme Court of the State was of the opinion that the State had a direct, pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and secondly, because were the litigation pushed to the extreme there might be penalties imposed which when collected pass into the school fund of the State. We quote its language:

'This section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons: First, 'the board of railroad commissioners;' second, 'any person or company interested in such order or requirement.' Now, while in actions under the statute

by person of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute out of any money in the treasury not otherwise appropriated, and is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the state treasury, it is true, but into the treasury of one of its politicial subdivisions for the benefit of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental has a real pecuniary interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense and is not subject to removal to the United States court, and we so hold.'

"We are unable to concur in these views. Whatever may be the result of any subsequent or ancillary proceeding the direct object of this suit is to obtain a decree of the court commanding the railway company to comply with the order of the commissioners. Such a decree is similar to the ordinary decrees of a court of equity, and it is familiar that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquents. So that if possible pecuniary result is sufficient to make the State the real party plaintiff it would follow that in Missouri the State is the real party plaintiff in every equity suit, because in every equity suit such penalties may be imposed.

"Neither can it be held that the State's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commissioners makes it the real party plaintiff. That is simply an incidental matter and does not determine its relation to the suit any more than its payment of the salary of the judge, fees of jurors or any other expenses of the litigation. We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the State of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it the party to whom alone the relief sought enures and in whose favor a decree for the plaintiff will effectively operate."

To the same effect are *Smyth v. Ames*, 169 U. S. 466; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *McNeill v. Southern Ry. Co.*, 202 U. S. 543.

The Circuit Court was, therefore, clearly correct in its decision that the present case was one in which the State of Nebraska was not the real party plaintiff.

## V.

**The Supreme Court of the State of Nebraska had jurisdiction of the case as originally begun.**

If it be argued that the Supreme Court of the State of Nebraska had no jurisdiction of the cause as originally begun, and that, therefore, the Federal Court could acquire no jurisdiction on removal, the answer is manifest.

In the first place, the question whether the Federal Court was without jurisdiction because the State Court, from which the cause was removed was without jurisdiction, if one of the questions involved in the decision upon the motion to remand, was one of the questions which the Circuit Court had the right to decide, and which the Circuit Court did necessarily decide. Its decision on that question was a decision within the jurisdiction of the court, and it cannot be reviewed or reversed upon the application for writ of mandamus. If the decision is claimed to be erroneous, the remedy for the party feeling aggrieved thereby, is by appeal or error from the final judgment or the decree as in other cases.

Under the decisions of the Supreme Court of Nebraska, however, the discussion of its jurisdiction of this suit as originally begun, must proceed upon different lines from those which determine the jurisdiction of the Federal Court. The Constitution of Nebraska gives to the Supreme Court of that State, original jurisdiction of all civil cases in which the State shall be a party (Constitution of Nebraska, Art. 6 Sec. 2). The Supreme Court of Nebraska has decided (*State v. Commercial State Bank*, 28 Neb. 677, and *State v. Exchange Bank*, 34 Neb. 198) that it has original jurisdiction in all civil cases in which the State is a party, regardless of the fact that the State may have no real interest in the controversy. The original jurisdiction of the State Supreme Court is, therefore, established by the fact that the suit was civil in its nature

and the State was a party thereto. But the decision as to the jurisdiction of the Federal Court is not determined by an inspection of the record to see that the case is civil in its nature and the State a nominal party. The jurisdiction of the Federal Court is determined by disregarding the formal arrangement of the parties and by examining the case to see if the State, though a nominal party, has any real interest in the controversy. When it is seen that the case presents a controversy between citizens of different States, and that the State of Nebraska has no real interest in the controversy, then while the presence of the State as a party will establish the jurisdiction of the State Supreme Court, it will not defeat the jurisdiction of the Federal Court.

## VI.

We have presented the grounds upon which the decision denying the motion to remand was based. In this connection, we call attention to the opinion of the learned judges holding the Circuit Court. This opinion is part of the return to the rule issued in this proceeding (Return pp. 18-23).

But while we present these grounds to the Court, we recognize that the discussion of the merits of the decision of the Circuit Court is irrelevant to the controlling question in this proceeding. The correctness of the judicial action taken by the Circuit Court cannot be reviewed upon an application for a writ of mandamus. On that application the only question to be considered is: Did the Circuit Court have a right to act? If there was presented on the motion to remand, a question which the Circuit Court had the right to decide, then its decision cannot be reversed or amended by a writ of mandamus.

That the Circuit Court had a right to decide the question presented is manifest. A petition for removal in due form with proper bond was duly filed in the State Court in due time. The transcript was duly lodged in the Circuit Court. The peti-

tion for removal alleged that the case presented a controversy wholly between citizens of different states, and that the State of Nebraska had no real or legal interest in that controversy. Upon this record, the Circuit Court was called upon to decide the question whether the allegations of the petition were true. That court did decide the question and held that the State of Nebraska had no real substantial interest in the controversy and that the controversy was in fact between citizens of different states. The decision was entirely correct; but, regardless of that fact, it was a decision which the court had a right to make, and it involved no abuse of judicial discretion. Any party feeling himself aggrieved by the decision, can have it reviewed in the regular way by appeal or error from the final decree. He cannot secure a premature review of the decision by applying for a writ of mandamus.

All of which is respectfully submitted.

WILLIAM D. McHUGH,
Attorney for Respondents.

MAXWELL EVARTS,
Of Counsel.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 12, Original.

NELSON THOMASSON, JR., ALBERT F. WELGE, JAMES BOLTON, JACOB BAUR, AND HENRY CRAWFORD, PETITIONERS,

*vs.*

THE CHICAGO RAILWAYS COMPANY ET AL.

## PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

HENRY CRAWFORD,
CHARLES H. ALDRICH,
*Solicitors for Petitioners.*

# IN THE CIRCUIT COURT OF THE UNITED STATES,

## Northern District of Illinois, Eastern Division.

| | |
|---|---|
| GUARANTY TRUST COMPANY OF NEW YORK *vs.* CHICAGO UNION TRACTION COMPANY. | No. 26727. |
| GUARANTY TRUST COMPANY OF NEW YORK *vs.* NORTH CHICAGO STREET RAILROAD COMPANY. | No. 26728. |
| GUARANTY TRUST COMPANY OF NEW YORK *vs.* WEST CHICAGO STREET RAILROAD COMPANY. | No. 26729. |
| CENTRAL TRUST COMPANY and G. SHERMAN *vs.* WEST CHICAGO STREET RAILROAD COMPANY ET AL. | No. 28883. |
| FIDELITY TRUST COMPANY *vs.* NORTH CHICAGO STREET RAILROAD COMPANY ET AL. | No. 28878. |

CONSOLIDATED CAUSE.

IN THE MATTER OF THE ORIGINAL AND AMENDED AND SUPPLEMENTAL PETITION OF THE CHICAGO RAILWAYS COMPANY.

## PETITION FOR APPEAL.

The petitioners, Nelson Thomasson, Jr., Albert F. Welge, James Bolton, and Jacob Baur, as registered stockholders, in their own right, of the West Chicago Street Railroad Company, and as a protective committee representing over

$250,000 of other shares of the same corporation, Jacob Baur, the payee and owner of a certificate of indebtedness issued by the receivers of the West Chicago Street Railroad Company and a proven creditor of the said corporation, with an adjudicated lien upon all the corporate assets under a decree of this court entered of record July 10, 1903, in equity case No. 26,729, and Henry Crawford, the payee and owner of a certificate of indebtedness issued by the receivers of the Chicago Union Traction Company and a proven creditor of said corporation, with an adjudicated lien upon all the assets of such corporation under a decree of this court entered of record July 10, 1903, in equity case No. 26,727, present this their petition of appeal and assignment of errors, and thereupon show to the court as follows:

1.

On April 22, 1903, the Guaranty Trust Company of New York, being a judgment creditor of the Chicago Union Traction Company, filed its bill in equity, No. 26,727, in this court, asking for the appointment of a receiver of all the assets of the judgment debtor, such property being described as a subsisting leasehold interest in the street railroad systems separately demised to it by the North Chicago Street Railroad Company and the West Chicago Street Railroad Company.

Receivers were appointed, who took possession of the defendants' property and received a formal assignment of the assets, and were instructed to operate the properties and out of its earnings pay all the maturing interest on all the outstanding mortgage bonds executed and issued by the lessors of such Chicago Union Traction Company.

2.

On the same day the Guaranty Trust Company of New York, being also a judgment creditor of both such lessor corporations, filed its separate creditor bill against the North

Chicago Street Railroad Company, being equity case No. 26,728, and also its creditors' bill against the West Chicago Street Railroad Company, being equity case No. 26,729, each praying for the sequestration of property, a marshaling of assets, and a distribution among creditors.

Receivers were appointed in each case and formal assignments of assets were made by each defendant. The orders appointing receivers provided that the receivers of the lessee company were to continue in the operation of the leased properties and out of the earnings were to pay all mortgage interest.

3.

On July 10, 1903, in each of such three administration suits, the court, on the application of the original complainant, entered a decree reciting that the complainant waived any priority over any other floating-debt creditor, and thereupon ordered that the suit should be prosecuted for the equal benefit of all unsecured creditors, and that any creditor of such class could become a quasi-complainant in the administration suit on an equality with the complainant on proving his claim to the receivers, who should thereupon issue an official certificate of indebtedness, reciting that such proven claim was a valid debt of the estate in custody, having, subject to the bonded debt, a lien on the judgment defendant's property and a right to be paid out of the current earnings interest at the rate of 6 per cent annually.

It was also adjudged in such decree of July 10, 1903, that the court would not sell or otherwise dispose of the property in its custody except on condition that such certified debt should be paid or accepted as a continuing lien on such property. Such decrees have never been modified or vacated.

The petitioners Baur and Crawford received their respective certificates under such decrees of July 10, 1903, and are entitled to all the rights, priorities, and liens therein adjudicated, and they have severally received from the

court's officers payment of the agreed interest on such certificates up to October 1, 1907, when the receivers failed to pay the instalment of interest then maturing, which has ever since remained in default.

4.

In 1903, under instructions of the court, the receivers of the West Chicago Street Railroad Company filed in this court an ancillary bill of complaint against the City of Chicago, claiming that as such receivers they were well seized of divers charter and ordinance rights and easements to maintain and operate said railroads in certain streets of the City of Chicago, and that such municipality disputed the validity of such street easements, and contended that such grants had expired, and threatened to physically prevent the further operation of such railroads and exclude said receivers from the occupancy of the streets, and praying that the title of the receivers in such street easements should be specifically adjudged and quieted and the said City of Chicago be enjoined from interfering with such adjudged charter and ordinance rights.

Thereafter, in 1905, the said bill of peace came on to be heard and a decree was rendered by the court defining the charter and ordinance rights in controversy and enjoining the City of Chicago from any interference with such decreed easements.

From such decree an appeal was taken by the City of Chicago to the Supreme Court of the United States.

In April, 1906, the decree of this court was reversed in certain particulars, but the court decided that as to all the lines of railroad constructed by the Chicago West Division Railway Company under ordinances which provided that such corporation and its successors and assigns should have the right to continuously maintain and operate its railroad on the streets and route specified in such ordinance until a cash purchase of the property, and that the corporation

became vested with an inviolate charter right to occupy the streets with its tracks and operate cars thereon until a cash purchase at the appraised value in accordance with the terms of the city ordinance.

The Supreme Court, in May, 1906, sent down its mandate directing this court to render a new decree in accordance with the principles of its decision.

There has been no compliance with such mandate. The receivers have made no effort to secure a new decree in accordance with such mandate. The court itself has not attempted any compliance with the direction of the Supreme Court. Both stockholders and creditors have asked the court to enter a decree in compliance with the mandate of the Supreme Court, but their applications have been either refused or ignored, and although the mandate has been on file nearly two years, there has never been any attempt, either by the receivers or the court, to obey its requirements.

5.

After such decision of the Supreme Court had been rendered, Henry A. Blair, one of the receivers of this court, together with the president of the West Chicago Street Railroad Company and certain persons interested as stockholders and creditors in the West Chicago Street Railroad Company and in the other two corporations who were made defendants in the other receivership suits and certain of their legal advisers, combined together and entered into a formal written contract to form a new corporation under the laws of Illinois, with a capital stock in the first instance of $100,000 and having seven directors, six to be designated by certain of the contracting parties and "one by a circuit judge of the United States for the northern district of Illinois."

The said agreement provided that the new company should obtain an ordinance from the City of Chicago, and that it should acquire the properties of the three defendant corporations in the administration suits, and of any leased or con-

trolled company, and "shall have possession, operation, control, charge of construction or rehabilitation, and all the other rights of ownership of the properties."

It was also provided in such agreement that "nothing in this agreement contained shall be taken as a recognition that any person or corporation has any interest in or shall be entitled to any allotment of stock or other securities or other compensation by reason of any interest in any of the properties above referred to;" and also "The parties signatory hereto agree and bind themselves to use all lawful means within their power to promote and consummate the matters, things, plans, and arrangements hereinbefore provided for or contemplated hereby."

6.

Shortly after the execution of such promoters' plan the Hon. Peter S. Grosscup, being circuit judge in charge of such administration suits, extrajudicially approved and associated himself with the said scheme and has ever since, out of court and personally, advocated such scheme and actively coöperated with the promoters thereof to fully carry out their stated purposes. With full knowledge that two of the receivers of his court had become directors in a corporation whose avowed purpose was to obtain possession of and ultimate title to all the properties being administered by the court, the said circuit judge further personally adopted such promoters' contract by exercising the privilege specified in the second paragraph, and designated Marshall E. Sampsell, then a receiver of the Union Traction Company by the said court's appointment, as director of the Chicago Railways Company, which had been selected as the new company to be used to carry out the plan.

During the negotiations for a city ordinance, when it was passed and for some time thereafter, each of the receivers of this court and the president of the West Chicago Street Railway Company were directors of the Chicago Railways

Company, constituting a majority of the board, which was seeking to obtain for itself a city ordinance purporting to extinguish the street easements of the existing owners and nullify without obedience the pending mandate of the Supreme Court, and also, by means of a plan of reorganization, to obtain present possession of the income and ultimate title to all the property under judicial administration.

Shortly after the execution of the said promoters' contract the aforesaid circuit judge, extrajudicially, personally, and without any record order or entry, designated and appointed a member of the Chicago bar as special counsel for said circuit judge, to appear for, represent, and speak for him in the negotiations to be conducted with the representatives of the City of Chicago to obtain an ordinance for the new company and to formulate the details of their proposed plan of reorganization and exchange of securities by which said promoters expected to obtain title to the street railroads in custody.

The special counsel of said circuit judge and the receivers and their counsel have been ever since engaged under the constant non-judicial direction of the said judge in negotiations with the representatives of the City of Chicago and stockholders, creditors, and mortgagees to secure the passage and acceptance of said ordinance and arranging the details and acceptance of the said plan of reorganization.

Although there is no order of record authorizing such use of earnings, the compensation to such special counsel, and a large part of the expenses incurred in negotiating the city ordinance and framing and promoting the plan of reorganization, the receiver of this court, under the non-recorded direction of the said circuit judge, has used a large amount of the earnings of the property in custody to pay such expenses and compensation, and in his official accounts has charged such payment as expenses of operating the properties in the court's custody.

7.

As a result of the negotiations conducted by the said circuit judge and his special counsel and his receivers and their counsel, the City Council of the City of Chicago, on February 11, 1907, passed an ordinance purporting to determine and annul any municipal authority for the present corporate owners to maintain or operate any of the lines of street railroads then in judicial custody and purporting to grant to the Chicago Railways Company the sole power and authority to maintain and operate existing street railroads on all the routes and lines now in the possession of the court's officers until February, 1927.

Such ordinance provides that, before it can be accepted by said grantee or become operative, the latter must be in actual lawful possession of all the properties then and now in judicial custody and vested with lawful power—

(1) To create, before securing any title thereto, a first lien upon all the said street railroad property so put into its possession to borrow money for improving the property and increasing the equipment;

(2) To recognize the City of Chicago as a partner in the net profits of the properties from and after February 1, 1907, and pay over to the city 55 per cent of the surplus gross earnings remaining after the payment of taxes, operating expenses, and 5 per cent annual interest on $29,000,000, being the value placed by the said ordinance on the existing properties taken over as of February 1, 1907, and also 5 per cent annual interest on the first-lien loan authorized for improvements;

(3) To transfer the possession and designated powers of the grantee over the property to the City of Chicago or its licensee;

(4) To convey to the said city a clear title to the property, free of all liens, debts, or rights and subject only to the improvement mortgage, on the payment of $29,000,000;

(5) To obtain within three years a good and sufficient title to all the street railroad properties operated by the receivers as of February 1, 1907;

(6) To prepare a plan of reorganization, which should equitably make provision for all mortgagees, creditors, and stockholders having existing interests in any of the properties in judicial custody and procure the approval of such plan by the said Grosscup and another designated person before it should become operative;

(7) To be placed in actual possession of all the properties in the court's custody, with lawful power to use the railroads and income to fully carry out the provisions of the ordinance and out of the income make the payments therein required.

8.

Thereafter the said Chicago Railways Company, with the active personal participation, advice, and direction of the said circuit judge, assisted by his special counsel and his receivers and counsel for such receivers and the committee designated by the promoters' contract of May 25, 1906, formulated a plan of reorganization, and in July, 1907, submitted the said plan to the said circuit judge and John C. Gray, designated as arbitrators or advisers of the said city.

The said arbitrators or advisers considered, revised, and amended such plan, and, as amended, approved the same in writing solely under the assumed authority vested in them by such ordinance and to enable the said Chicago Railways Company to further carry out the original promoters' contract by compliance with the conditions imposed by the said ordinance.

9.

On July 15, 1907, the said Chicago Railways Company filed its original intervening petition in this court, alleging the passage of said ordinance to it; that it had prepared a

scheme of reorganization as therein required, which had been approved by said circuit judge and said Gray and had been accepted by a large number of bondholders, creditors, and stockholders of the several corporations whose properties were being administered by the court, and prayed that the court would by proper decree transfer to and vest the said intervenor with lawful possession of all the properties in the court's custody, and decree that it was also vested with lawful power to mortgage such properties with a first lien for improvement purposes and with power to use the future earnings to pay to the City of Chicago its share of the profits of operation and exercise all the other powers over the property specified in said ordinance.

The said ordinance and approved plan of reorganization were made exhibits to such intervention, which was signed for the Chicago Railways Company and verified by the oath of F. H. Lawson, the president of the West Chicago Street Railroad Company.

10.

This court, on July 15, 1907, entered a rule that all parties in interest should on July 24, 1907, show cause why the prayer of such petition should not be granted.

On said July 24, 1907, these petitioners appeared and filed their verified response and answer to the said intervention and prayed that it should be dismissed for want of jurisdiction and the rule should be discharged. To such response the said intervenor filed its replication.

On August 12, 1907, the said Grosscup presided at the final hearing of the petition. Some of the testimony submitted at such hearing was orally presented to the court and some was taken before a master designated by said Grosscup for that purpose. On such reference the special counsel for said Grosscup claimed and exercised the right of an ordinary litigant and avowedly in behalf of said presiding judge offered both oral and documentary evidence in support of said intervention.

Thereupon, on August 12, 1907, the said Grosscup allowed and entered of record a decree turning over possession of all the street railroad properties in its custody to the intervenor and adjudged that it was vested with lawful power to displace existing liens and create by its own contract a paramount first lien upon the properties, and also with lawful power to recognize the City of Chicago as a partner in the operations of the property, and to pay over to it its share of the earnings as provided in said ordinance, and also to use the property and its earnings in accordance with the provisions of such ordinance, including the right to transfer clear title and lawful possession of all such street railroads to the city on receipt of a price fixed by the city. The circuit judge said in his opinion, granting full relief to the intervenor: "To obtain just such an offer as this * * * the court and those aiding it have for four years now patiently waited and faithfully worked."

11.

On August 15, 1907, these petitioners prayed and were allowed an appeal from such decree to the United States Circuit Court of Appeals for the Seventh Circuit. They filed a bond which was approved and perfected their appeal upon a single record, by stipulation with other appellants.

On September 7, 1907, the several appeals of the petitioners and other parties were heard by the said Circuit Court of Appeals, and a decree was rendered, reversing the decree of August 12, 1907, rendered by said circuit judge and remanding the case.

12.

After the reversal the said Chicago Railways Company procured from the City of Chicago the passage of an ordinance extending the time within which the said ordinance of February 11, 1907, could be accepted by the Chicago Railways Company until February 1, 1908.

The passage of such extension ordinance was secured mainly, if not wholly, because the said Sampsell, as receiver of the Chicago Union Traction Company, delivered to the mayor of the city a written obligation that if such extension was granted he would apply all of the earnings of the system in his charge after the payment of operating expenses to the purpose of rehabilitation and would improve and reconstruct the systems then operated by the receiver "in the same manner and to the same extent as would have been required of the Chicago Railways Company by said ordinance of February 11, 1907, if accepted by said company within the time specified in said ordinance as amended by said ordinance of July 8, 1907."

There never was an order or entry of record which authorized the receiver to enter into or perform such obligation, purporting to bind all the net earnings of the properties in court over actual operating expenses to the actual discharge of the financial covenants of the intervenor in an unaccepted ordinance. The said receiver, before he delivered such written promise, consulted with the said Grosscup, and was orally advised to deliver such obligation. Both the receiver and the circuit judge, before the former committed himself to such misuse of the earnings, well knew that the performance of his promise would of necessity force a default in the payment of the semi-annual interest, amounting to about $257,000, which would fall due on November 1, 1907, upon the first mortgage and consolidated mortgage bonds executed by the West Chicago Street Railroad Company, which had been fully earned by the mortgaged property and which had never been defaulted.

Thereafter the said Chicago Railways Company, on October 15, 1907, promulgated a plan of reorganization, changing and modifying its original plan of August 9, 1907, and submitted the said modified plan to Peter S. Grosscup and John C. Gray, who, on November 2, 1907, purporting to act under the power and authority vested in them by the ordi-

nance of February 11, 1907, approved the same and in writing certified such modified plan and agreement "as being based on the legal rights of the depositors under said deposit agreement as of the date of the passage of the said ordinance under the respective leases to and from the companies named in said deposit agreement and as being fair and just to each class of depositors relatively to the treatment accorded to every other class of stocks, securities, and evidences of indebtedness."

Petitioners show that the said modified plan, so non-judicially certified by said Grosscup to be fair and just, by its terms provides in the distribution of new securities thereunder, that—

(1) $3,634,200 of existing bonds now secured by mortgages covering only the properties of the North Chicago City Railway Company or the North Chicago Street Railroad Company shall receive in exchange an equal amount of Class "A" bonds, which will constitute a prior lien on also the property of the Chicago West Division Railway and the property of the West Chicago Street Railroad Company, in displacement of $9,263,400 West Chicago Street first and consolidated bonds, to which are allotted bonds of Class "B."

(2) The 6,251 shares of the Chicago West Division Railway Company, being a majority of the stock of that company, and owned by the West Chicago Street Railroad Company, is by said modified plan wholly annihilated.

(3) The 7,300 shares of the Chicago Passenger Railway Company, being a majority of the stock of that company, and owned by the West Chicago Street Railroad Company, is by said modified plan wholly annihilated.

(4) The 32,000 shares of the West Chicago Street Railroad Company owned by the Chicago Union Traction Company and by it pledged as special security for the payment of the floating debt of the said West Chicago Street Railroad Company is by said modified plan wholly annihilated and the special security to creditors is thereby destroyed.

(5) The said modified plan provides for a cash fund of $4,000,000, to be raised by the sale of $5,000,000 collateral notes secured by $5,867,200 Class "A" consolidated bonds, of which cash fund an estimated residuary balance of $1,969,000 is appropriated, among other purposes, to "the discharge of organization, reorganization, legal and other expenses."

On November 29, 1907, the said Chicago Railways Company filed in said three first above named administration suits its amended and supplemental petition, based upon the said ordinance of February 11, 1907, and said modified plan of reorganization, as approved by said Grosscup and Gray, and prayed thereon that the court would enter a decree vesting it with possession of all the street-car properties in its custody and adjudging that such intervenor has lawful power to exercise, as against the said property and its revenues, all the powers specified in the said ordinance and plan.

No rule was entered to show cause against such amended and supplemental petition, but an ordinary notice was served upon the parties interested, including these petitioners, that the original and amended petition would be brought on for hearing in December, 1907. These petitioners thereupon, on December 9, 1907, filed their response and answer under oath to such amended intervention. In such response the petitioners pleaded that the said city ordinance of February 11, 1907, was an unconstitutional impairment of divers of the charter and ordinance contracts, which vested and defined its street easements in the lawful ownership and enjoyment of the receivers of the West Chicago Street Railroad Company, as conclusively adjudicated by the Supreme Court of the United States in the bill of peace filed by such receivers against the City of Chicago; that the said city ordinance of February 11, 1907, was an attempt to deprive the said West Chicago Street Railroad Company and its stockholders and creditors of its property without due process

of law, in violation of the Fourteenth Amendment to the Constitution of the United States; that the said ordinance constituted an illegal taking of property without just compensation; that the cause of action stated in such intervention was a new and independent controversy, in no way related to the case presented by the original creditors' bill, and therefore the circuit court had no jurisdiction over such new controversy, because both the intervenor and the corporations whose property it was seeking to obtain under the said ordinance were all citizens of Illinois; that the intervenor charter had expired under the laws of Illinois, and that it was without any financial responsibility or existing corporate capacity to purchase, maintain, or operate the street-car properties it was seeking to acquire; that the court had no judicial power to decree, on petition and rule to show cause, that the City of Chicago should become partner in the operation of the street-car properties and annually receive the larger portion of the net earnings; that the court had no judicial power to decree, on petition and rule to show cause, the specific performance of a city ordinance and plan of reorganization as against any objecting creditors or stockholders; that the West Chicago Street Railroad Company and system had always earned a large surplus over its operating expenses, taxes, rentals, and interest on bonds and debt, and that the action of said receiver, under the oral instruction of the circuit judge, in refusing to pay the interest due November 1, 1907, on two of its mortgages was absolutely unnecessary and was conceived and put into execution with intent to assist the intervenor to obtain possession of and title to the property of said West Chicago Street Railroad Company by forcing an unnecessary default upon its mortgages, so that creditors and stockholders would be coerced into accepting such plan of reorganization by the fear of foreclosure and the extinction or great impairment of their interests; that petitioners also specifically challenged the lawful right or propriety of the said circuit judge hearing

the application of the intervenor or rendering any decree to enforce the provisions of a city ordinance and plan of reorganization which he had personally and actively assisted out of court in negotiating and had been extrajudicially an avowed partisan promoter.

The said circuit judge ignored such challenge and proceeded to hear and decide the intervention. A final decree was entered on December 26, 1907, based on the original and amended petition granting all the relief prayed therein.

From that decree these petitioners pray an appeal to the Supreme Court of the United States and present the following assignments of error. They further pray that an appeal bond, to act as a supersedeas, may be approved.

NELSON THOMASSON, JR.
ALBERT F. WELGE.
JAMES BOLTON.
JACOB BAUR.
HENRY CRAWFORD.

ALDRICH & MCAULEY,
NELSON THOMASSON, JR.,
*Solicitors.*
CHARLES H. ALDRICH,
HENRY CRAWFORD,
*Of Counsel.*

---

STATE OF ILLINOIS, *County of Cook, ss:*

Nelson Thomasson, Jr., on oath says that he is one of the applicants for an appeal mentioned in the above and foregoing petition; that he has read the same and knows the contents thereof, and he states that all the averments in said petition contained are true to the best of his knowledge, information, and belief.

NELSON THOMASSON, JR.

Subscribed and sworn to before me, a notary public in and for said State and county, this 9th day of January, 1908.

Witness my hand and official seal.

[Seal A. G. Loveless, Notary Public, Cook County, Ill.]

A. G. LOVELESS,
*Notary Public.*

---

## Assignments of Error.

The petitioners, Nelson Thomasson, Jr., Albert F. Welge, James Bolton, Jacob Baur, and Henry Crawford, say that in the record in the above-entitled consolidated cause there is manifest error in the proceedings and decree rendered December 26, 1907, upon the original and amended and supplemental petition of the Chicago Railways Company, adjudging that such petitioner was entitled to and should forthwith be placed in lawful possession of all the property, franchises, and ordinance rights of the defendant corporations, being the West Chicago Street Railroad Company, the Chicago West Division Railway Company, the Chicago Passenger Railway Company, the West Chicago Street Railroad Tunnel Company, the North Chicago Street Railroad Company, the North Chicago City Railway Company, and the Chicago Union Traction Company, with lawful power to exercise all the rights and powers over such properties as is specified in a certain ordinance passed by the City Council of the City of Chicago in February, 1907, making certain grants to the Chicago Railways Company.

The following errors are assigned:

1.

The city ordinance of February 11, 1907, on which the intervention was based, was an attempt to deprive the West

Chicago Street Railroad Company and its creditors and stockholders of their property without due process of law, contrary to the prohibition of the Fourteenth Amendment to the Constitution of the United States, and the circuit court had no rightful judicial power to recognize or give effect to such unconstitutional municipal legislation or to adjudge any rights or powers thereunder to the intervenor.

2.

The said ordinance and the decree enforcing the same constitute a taking for the use and benefit of the City of Chicago of property of the West Chicago Street Railroad Company and its creditors and stockholders without payment of just compensation, contrary to the prohibition of the Fifth Amendment to the Constitution of the United States.

3.

The said ordinance was an unlawful impairment of the obligation of divers charters and ordinance contracts, wherein the State of Illinois and the City of Chicago granted valuable and long continuing easements to the lessor of the West Chicago Street Railroad Company, contrary to the prohibition of the Constitution of the United States.

4.

The modified plan of reorganization adopted in advance by said city ordinance and approved by Hon. Peter S. Grosscup, assuming to act as an arbitrator under an appointment by the City of Chicago, excluded from any participation and totally destroyed $625,100, par value of the stock of the Chicago West Division Railway Company owned by the West Chicago Street Railroad Company, and in that respect deprived the last-named company, its creditors and stockholders, of their property without due process of law.

5.

The aforesaid plan of reorganization excluded from any participation and totally destroyed $3,200,000 par value of the stock of the West Chicago Street Railroad Company owned by its lessee and specially pledged by it to secure the payment of the floating debt of the West Chicago Street Railroad Company, and thereby deprived the said last-named company and its creditors and stockholders of property without due process of law.

6.

The said ordinance, in providing that the City of Chicago, through the intervenor as its trustee, should be vested with lawful possession of all the property owned by and leased to the West Chicago Street Railroad Company, subject to the continuing obligation during twenty years to pay over to the city 55 per cent of the net earnings of such property, was an unlawful impairment of divers charter and ordinance contracts vesting street easements for railroad purposes in the said West Chicago Street Railroad Company and its lessors, contrary to the prohibition of the Constitution of the United States.

7.

The said ordinance, in authorizing the Chicago Railways Company to maintain and operate a street railroad on the following streets, viz, Madison, Lake, Randolph, Desplaines, Milwaukee Avenue, Canal, Harrison, South Wells, Van Buren, Twelfth, Halstead, Clinton, Meagher, Jefferson, Chicago Avenue, Indiana, and Polk, unconstitutionally impaired the charter and ordinance contracts under which its lessor constructed such lines, whereby it was vested with an unexpired exclusive easement to construct and operate its railroad on all such streets, and the operation of railway cars on any of such streets by any other person was expressly prohibited.

8.

Under the charter and city ordinances under which the street railroad lines of the Chicago West Division Railway Company and its lessee, the West Chicago Street Railroad Company, were constructed, neither of such corporations were under any obligation to give or accept single-fare transfers to or from either the North Chicago City Railway or the Chicago Consolidated Traction Company. The ordinance to the intervenor requires the conductors on all cars operated on the lines now owned by the West Chicago Street Railroad and the Chicago West Division Railway Companies to issue and receive transfers for a single fare. Such exaction is an unconstitutional impairment of the subsisting charter and ordinance rights of such last-named corporations and a taking of their property and that of their creditors and stockholders without due process of law or just compensation.

9.

Under the pending mandate issued by the Supreme Court of the United States, requiring the circuit court to enter a proper decree defining the street easements belonging to the West Chicago Street Railroad and quiet the title thereto as against the City of Chicago, the circuit court has no judicial power to adjudge that the city should become a partner in the profits of operating such street railroads, or to decree that the ordinance rights which the pending mandate requires shall be adjudicated and protected should be absolved, surrendered, and released to the city.

10.

The intervention of the Chicago Railways Company presented a new, distinct, and independent controversy, in no sense germane to the original creditors' bill. The intervenor is a corporation and citizen of the State of Illinois and each

of the street-car corporations whose properties are dealt with in the city ordinance sought to be specifically enforced are also corporations and citizens of the State of Illinois, and therefore the circuit court had no lawful power to entertain or decide such new controversy, which was not properly within the jurisdiction of said circuit court of the United States.

11.

The circuit court had no jurisdiction whatever, as against objecting stockholders or creditors of the West Chicago Street Railroad Company, to compulsorily enforce the acceptance of such city ordinance or to deliver possession of all the corporate property under administration to the said intervenor and by decree invest it with the power annually to pay over to the city a large part of the net profits of operation, and with the power to convey a title to the City of Chicago to all such corporate property, clear of all incumbrances and claims, for a sum of money fixed by such ordinance.

12.

The said circuit court had no judicial power to convert the equity suit of a judgment creditor into a proceeding to formulate, approve, and, by decree operating directly upon all the corporate property and assets, specifically enforce a plan of reorganization, as against objecting stockholders and creditors, by delivering absolute possession of the property in custody and its earnings, without purchase, to the intervenor, or to require such objecting creditors and stockholders to show cause in said circuit court, after the property had left its custody why they should not be concluded by such scheme and decree and required to accept in exchange for their existing claims and interests the securities of the intervenor, with the City of Chicago as the controlling partner both in management and profit.

13.

The circuit court had no power to deliver the possession of the corporate property, franchises, and earnings to a stranger corporation, without any color of title or right of possession, on condition that such intervenor would create a prior charge of millions of dollars for improvements purposed on property already mortgaged and recognize the city as a partner in the profits of future operations, and that it would proceed to carry out the detail of a plan of reorganization accepted by only a portion of the stockholders and creditors.

14.

The said circuit court, as presided over and held by Hon. Peter S. Grosscup, circuit judge, was not legally constituted and had no rightful jurisdiction to hear such intervention or render such decree of December 26, 1907, because the said circuit judge had actively participated in person and by receivers and agents in negotiating said city ordinance and formulating, amending, and promoting such original and modified plan of reorganization, and the said circuit judge, as against the sworn challenge of the petitioners, had no lawful power to assume the bench to hear, adjudge, and enforce a city ordinance and plan of reorganization largely negotiated by him and of which he was the avowed and active partisan, even appearing by his own special counsel on the reference to his own master and offering both oral and documentary evidence to support the intervention upon which he assumed to rule.

HENRY CRAWFORD,
CHARLES H. ALDRICH,
*Solicitors for Appellants.*

## Order of Mr. Justice Day.

Upon consideration of this record, and in view of the important questions and interests involved, I respectfully request that counsel be permitted to present this application for appeal and supersedeas to the court.

WILLIAM R. DAY,
*Associate Justice, U. S. Supreme Court.*

WASHINGTON, *January* 15, 1908.

[Endorsed:] 26,729 (Consolidated cause). Circuit Court of United States, Northern District of Illinois, Eastern Division. Guaranty Trust Company of N. Y. *vs.* West Chicago Street Railroad Co. *Re* Petition of Chicago Railways Co. Petition for Appeal and Assignment of Errors of Nelson Thomasson, Jr., *et al.* Aldrich & McAuley, Home Insurance Building.